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In the Supreme Court of the United States

R.J. REYNOLDS TOBACCO CO., *et al.*,

Petitioners,

v.

HOWARD A. ENGLE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Due Process Clause prohibits a state court from giving preclusive effect to a jury verdict when it is impossible to discern which of numerous alternative grounds formed the basis for the jury's findings of wrongful conduct.

2. Whether, merely by invoking characterizations such as "fraud" or "negligence," a plaintiff may evade federal preemption under this Court's ruling in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), which holds that the Federal Cigarette Labeling and Advertising Act preempts state-law liability based, *inter alia*, on allegations that cigarette manufacturers failed to warn about the dangers of smoking or marketed cigarettes in ways that "neutralized" the federally mandated warnings.

RULE 14.1(b) AND 29.6 STATEMENT

Petitioner Philip Morris USA Inc. is a wholly owned subsidiary of Altria Group, Inc. Altria Group, Inc. is the only publicly held company that owns 10% or more of Philip Morris USA Inc.'s stock. Altria Group, Inc. is a publicly held company. No publicly held company owns 10% or more of Altria Group, Inc.'s stock.

Petitioner Brown & Williamson Holdings, Inc. is an indirect, wholly owned subsidiary of British American Tobacco, p.l.c., a publicly traded corporation. Before August 2, 2004, Petitioner was known as Brown & Williamson Tobacco Corporation. On July 30, 2004, a transaction was completed whereby Petitioner R.J. Reynolds Tobacco Company became the successor in interest to Brown & Williamson Tobacco Corporation's U.S. tobacco business.

Petitioner R.J. Reynolds Tobacco Company, a North Carolina corporation, is the successor by merger to R.J. Reynolds Tobacco Company, a New Jersey corporation. The existing R.J. Reynolds Tobacco Company is an indirect, wholly owned subsidiary of Reynolds American Inc., a publicly traded corporation. Petitioner Brown & Williamson Holdings, Inc. owns approximately 42% of the common stock of Reynolds American Inc. As noted above, Brown & Williamson Holdings, Inc. is an indirect, wholly owned subsidiary of British American Tobacco, p.l.c., a publicly traded corporation.

Petitioner Lorillard Tobacco Company is wholly owned by Lorillard, Inc., which is wholly owned by Loews Corporation. Shares of Loews Corporation are publicly traded. Other subsidiaries of Loews Corporation that are not wholly owned by Loews Corporation but have some securities in the hands of the public are CNA Financial Corporation and Diamond Offshore Drilling, Inc. In addition, Loews Corporation indirectly owns 100% of the general partner of Boardwalk Pipeline Partners, LP, whose subsidiaries, Boardwalk Pipelines, LP and Texas Gas Transmission, L.L.C., have issued

bonds that are publicly owned. Loews Corporation has also issued Carolina Group stock, a publicly traded tracking stock.

Petitioner Liggett Group LLC ("Liggett"), formerly known and sued in this matter as Liggett Group Inc. and Brooke Group Holding Inc., is a Delaware limited liability company. Vector Group Ltd. indirectly owns 100% of the interest in Liggett. Vector Group Ltd. is publicly traded on the New York Stock Exchange. No publicly held company owns 10% or more of Vector Group Ltd.'s stock.

Petitioner The Tobacco Institute, Inc. is a dissolved not-for-profit corporation organized under New York law. During its existence The Tobacco Institute, Inc. did not issue stock and had no parent corporation. In addition, since its dissolution, The Tobacco Institute, Inc. has not issued stock and has had no parent corporation.

Petitioner The Council for Tobacco Research U.S.A., Inc. is a dissolved New York not-for-profit corporation. It was dissolved pursuant to the New York Not-for-Profit Corporation Law on November 6, 1998. Prior to its dissolution, it had no parent companies, subsidiaries, affiliates, or stockholders.

The other parties to the proceeding in the Florida Supreme Court, respondents here, were Frank Amodeo, Robert W. Angell, Ralph Della Vecchia (as Personal Representative of the Estate of Angie Della Vecchia), Howard A. Engle, Mary Farnan, Raymond Lacey, Loren E. Lowery, Michael Mayti, and Frosene D. Steevens.

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OPINIONS BELOW

The opinion of the Supreme Court of Florida (App. A, *infra*) is reported at 945 So. 2d 1246. The opinion of the Third District Court of Appeal (App. B, *infra*) is reported at 853 So. 2d 434. The relevant order of the Circuit Court of the Eleventh Judicial Circuit for Miami-Dade County (App. C, *infra*) is reported at 2000 WL 33534572.

JURISDICTION

The opinion of the Supreme Court of Florida was filed on July 6, 2006. That court issued a slightly revised opinion on December 21, 2006, but otherwise denied petitioners' request for rehearing. On March 19, 2007, Justice Thomas extended the time to petition for certiorari to May 20, 2007.

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a). This case began as a massive class action for personal injuries allegedly suffered by more than 700,000 cigarette smokers. It is the first smokers' class action to be tried to judgment. Despite recognizing that the class had to be decertified, the Florida Supreme Court issued an unprecedented ruling that certain vague jury findings from the class trial are to have "res judicata effect" in new suits brought by individual members of the former class. This petition raises two questions concerning that judgment: whether the decision to give preclusive effect to the generalized jury findings violated due process; and whether the verdicts, both classwide and in favor of two individual respondents whose claims were fully tried, were barred by federal preemption.

The Florida Supreme Court's ruling terminates this case, but for the possibility that those two individuals may elect to seek punitive damages on remand. The preclusion ruling, which is the subject of the due process challenge, has no ef-

fect on those two individuals and thus is final for purposes of Section 1257 no matter what they elect to do.

As for federal preemption, this Court has jurisdiction because that issue "will survive and require decision regardless of the outcome of future state-court proceedings." *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 480 (1975). Any subsequent hearing on individual punitive damages claims could not "foreclose or make unnecessary" a ruling on the preemption issue. *Id.* Jurisdiction under Section 1257 thus is appropriate because, like the accounting in *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 123-25 (1945), the further state-court proceedings in this case would decide nothing but the final sum of money that will be awarded to the two individuals. See also, *e.g.*, *Brady* v. *Maryland*, 373 U.S. 83, 85 n.1 (1963) (jurisdiction existed over due process challenge to a criminal conviction even though defendant's sentence had not yet been finally determined).

STATUTORY PROVISION INVOLVED

15 U.S.C. § 1334(b) provides: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter."

STATEMENT

This case arises out of an enormous class action involving what plaintiffs estimated to be 700,000 citizens and residents of Florida who suffered or are suffering from illnesses caused by their addiction to cigarettes. The Florida Supreme Court upheld multimillion-dollar compensatory awards to two individual plaintiffs, but recognized that class action treatment was inappropriate and ordered the class decertified. Nonetheless, adopting what it termed a "pragmatic solution," the court announced on its own initiative that certain highly generalized findings made by the jury regarding unspecified

acts by petitioners over a 50-year period would have "res judicata effect" in individual suits by former class members.

Two fundamental defects plague this ruling and, if not addressed by this Court, will contaminate all cases filed by individual class members. First, the ruling conflicts with long-standing and universally accepted limitations on the use of issue preclusion – limitations that this Court has held to be required by due process. The findings to which the Florida Supreme Court has given preclusive effect were the product of a sprawling, year-long trial that touched upon myriad aspects of five separate defendants' conduct in designing, manufacturing, and marketing cigarettes over half a century. The resulting verdicts give no indication which of respondents' numerous and varied allegations of wrongful conduct the jury credited. Instead, the jury returned a set of abstract and generalized findings – for example, that petitioners "were negligent" and that they sold cigarettes that "were defective." Thus, although the jury found that petitioners engaged in wrongful conduct, its findings do not reveal what petitioners did wrong.

Yet the Florida Supreme Court has directed that those generalized findings be treated as preclusive in all follow-on litigation. As judges and juries throughout Florida attempt to implement the Florida Supreme Court's mandate in new cases, they will be called upon to make unfounded guesses about what the jury's findings mean. Giving res judicata effect to these findings violates a basic due process rule announced over a century ago: Where evidence "was offered at the prior trial upon several distinct issues, the decision of any one of which would justify the verdict or judgment," that verdict or judgment cannot be taken as "an adjudication upon any particular issue or issues; and the plea of *res judicata* must fail." *Fayerweather* v. *Ritch*, 195 U.S. 276, 307 (1904).

Moreover, the Florida Supreme Court's decision is emblematic of the tendency of some courts to use the tools of

aggregation to push the adjudication of mass tort claims beyond previously recognized boundaries in the name of efficiency. If not corrected, the decision below will generate a series of artificial "trials" in which key aspects of plaintiffs' proof and defendants' defenses will be reduced to a charade. Certiorari is warranted to make clear that state courts may not sacrifice long-standing protections of the right to a full and fair trial merely because they find it "pragmatic" to do so. The time for review is now, before petitioners and the courts are subjected to the substantial burdens of those constitutionally impermissible proceedings.

Second, both the generalized jury findings and the individual damages awards rest on evidence, arguments, and theories of liability that are preempted by federal law. In *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), this Court held that the Federal Cigarette Labeling and Advertising Act ("Labeling Act") expressly preempts claims (1) that cigarette manufacturers failed to warn the public about the health effects of smoking or (2) that manufacturers, through advertising or promotion, "neutralized" the effect of the federally mandated labels that explicitly warn the public about those health effects. In this case, respondents advanced just such failure-to-warn and neutralization claims. Nevertheless, petitioners' preemption objections were overruled on the theory that *Cipollone* does not require preemption of such claims when labeled as "fraud" claims or treated as falling within other traditional causes of actions such as "negligence."

This case thus illustrates the substantial uncertainties that have divided the lower courts over the proper interpretation of *Cipollone*. Because of the recurring and central nature of this issue in tobacco litigation, there is a pressing need for this Court to dispel the confusion created by its fractured decision in *Cipollone* by making clear that concealment and neutralization claims are preempted, however they are la-

beled. Review of this issue is also warranted because the rejection of petitioners' preemption defense, coupled with the Florida Supreme Court's preclusion holding, sets the stage for findings resting on preempted theories to be given effect in cases brought by former class members across the State. Deferring review would allow error to be injected into potentially every one of those cases, creating a mess that would take years to clean up, with a monumental waste of resources in the meantime.

1. This case began in May 1994, when six individuals filed a class action complaint in the Florida Circuit Court for Miami-Dade County seeking damages from petitioners, the major domestic cigarette companies, for injuries allegedly caused by smoking. App., *infra*, 69a-70a. They sought hundreds of billions of dollars in compensatory and punitive damages. *Id.* at 74a. A class was ultimately certified consisting of an estimated 700,000 Floridians (and their survivors) "who have suffered, presently suffer or who have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine." *Id.* at 6a.

Over petitioners' objections, the trial court implemented a multi-phased trial plan. Phase I consisted of a year-long trial of asserted "common issues" relating to petitioners' conduct and the general health effects of cigarette smoking. App., *infra*, 6a. During this phase, respondents presented evidence of many different kinds of alleged misconduct occurring over more than five decades. Asserting negligence and product defect, for instance, respondents advanced hundreds of different allegations relating to the design, manufacture, and marketing by different petitioners of a wide array of cigarette brands. Similarly, asserting fraud and breach of express warranty, respondents introduced thousands of communications – from tobacco advertisements and promotional materials to public statements by tobacco companies – that

allegedly concealed material information or made various false representations.[1]

None of this evidence was linked to the circumstances of any identifiable class member. See T.36358-59; T.36445; T.36746. In allowing this agglomeration of diverse evidence of petitioners' actions – none of which could possibly have affected all class members, and only a small fraction of which would have been admissible in any individual's case – the court effectively permitted respondents to try the case as though the class consisted of a fictional composite plaintiff who smoked every cigarette brand; saw, heard, and relied upon every tobacco advertisement; and developed every possible smoking-related injury. The prejudice inherent in this procedure was compounded by the misconduct of respondents' trial counsel, who likened petitioners' activities to the horrors of slavery and the Holocaust, repeatedly engaged in racial pandering before the predominantly African-American jury, and expressly invited the jury to disregard the law.[2]

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[1] See, *e.g.*, T.11202 (testimony concerning the "Frank Statement" of 1954); T.12879-82 (testimony concerning a presentation focusing on 65-70 different tobacco advertisements, including ads for Camel cigarettes, Chesterfields, and Virginia Slims); T.16385-86 (introduction of Joe Camel ads from *Rolling Stone* magazine, discussion of *Sports Illustrated* cigarette promotions and product placements in various films); T.18695-98 (testimony concerning how various magazines refused to publish information about the health effect of cigarettes out of concern about losing advertising revenue); T.18983-89 (testimony concerning advertising from the 1930s and 1940s involving doctors' endorsement of cigarettes).

[2] See, *e.g.*, T.36348 ("You want to be fair, and you say: Right, there's two sides to every question. What's the other side to the holocaust? * * * What is the other side to slavery?"); T.36490 ("The whole civil rights movement of the '60s was fighting against unjust laws. Dr. King was arrested in the '60s."); T.36371 ("[Defendants say:] It's a legal product. It's a legal product. Legal don't make it right.").

Not only did respondents present multiple, alternative theories of wrongdoing in support of each of their legal claims, and seek to substantiate their theories with a blizzard of different acts and omissions, but they proposed a verdict form that asked nothing more than highly generalized questions about defendants' conduct. App., *infra*, 192a-206a. Petitioners objected (R.215: 49493-49532), arguing that, if the Phase I verdicts were to be used by new juries in future proceedings, the verdict form had to be sufficiently detailed to identify the factual content of and basis for the jury's ultimate findings. The trial court rejected petitioners' objection and adopted respondents' generalized form. T.35893-95; T.35952-54.

Accordingly, the jury's findings are remarkably abstract. The jury found, *inter alia*, that petitioners:

- "placed cigarettes on the market that were defective and unreasonably dangerous";
- "made a false or misleading statement of material fact with the intention of misleading smokers";
- "concealed or omitted material information not otherwise known or available knowing that the material was false or misleading or failed to disclose a material fact concerning the health effects or addictive nature of smoking cigarettes or both";
- "sold or supplied cigarettes that were defective";
- "were negligent"; and
- sold or supplied cigarettes that "did not conform to representations of fact" made by petitioners.

App., *infra*, 6a-7a, 192a-206a.[3] It is impossible to ascertain from these findings which of the various designs of petition-

[3] Petitioners do not challenge giving preclusive effect to two sufficiently specific causation findings: that smoking causes certain enumerated dis-

ers' hundreds of cigarette brands were defective, in what ways they were defective, what facts were concealed or by whom, which cigarettes failed to conform to which representations, or how petitioners had acted negligently.

In Phase II-A, the same jury heard evidence relating to three individual smokers hand-picked by respondents' counsel: Frank Amodeo, Angie Della Vecchia, and Mary Farnan. App., *infra*, 7a. It determined that certain (again unspecified) conduct found wrongful in Phase I caused injury to those individuals, awarding compensatory damages totaling $12.7 million. In Phase II-B, the jury awarded a lump sum of $145 *billion* in punitive damages.

2. Throughout Phases I and II, respondents were allowed to adduce evidence and arguments relating directly to contentions that petitioners submit were expressly preempted by the Labeling Act. In particular, respondents claimed that (1) petitioners concealed information or failed to provide adequate warnings about the health risks of smoking and (2) petitioners' advertising "neutralized" the federally mandated warning labels. See *infra*, II.A. When petitioners objected, the court expressed contempt for the very idea of federal preemption, saying that it "[b]oils my blood and boggles my mind" and suggesting that preemption "doesn't apply to modern science and what's happening today." T.16621-22.

At the close of Phase I, petitioners proposed an instruction to make clear to the jury that it could not base liability on preempted theories, including concealment and "neutralization." App., *infra*, 190a-191a. The trial court rejected petitioners' proposal. The instruction given by the court said nothing about "neutralization" and, although it stated that respondents' claims could not be based on a mere failure to warn after 1969 (when Labeling Act preemption took effect),

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eases; and that cigarettes containing nicotine are addictive or dependence producing. App., *infra*, 6a, 193a-194a.

it advised the jury – incorrectly – that "federal law does not limit the liability of any defendant for claims based on negligence, strict liability, express warranty, fraud, misrepresentation, or conspiracy." T.37569-70.

Following the Phase II-B verdict, petitioners moved, *inter alia*, for class decertification, remittitur, and judgment as a matter of law. The trial court denied these motions. App., *infra*, 127a-186a. Rejecting petitioners' preemption arguments, the court held that federal law "certainly does not preempt any acts of fraud or conspiracy committed by the defendants subsequent to 1969." *Id.* at 138a. The court entered a final judgment ordering petitioners immediately to pay (1) the compensatory damages awarded to the three individual plaintiffs whose claims were tried in Phase II-A and (2) the $145 billion punitive damages award. *Id.* at 183a-185a.

3. The Florida Third District Court of Appeal reversed the judgment in its entirety and ordered the class decertified. App., *infra*, 68a-126a. Citing the extensive body of case law refusing to certify smokers' claims as class actions (*id.* at 75a-77a), the court held that "this case presents a multitude of individualized issues which make it particularly unsuitable for class treatment" (*id.* at 87a). Indeed, "each class member had unique and different experiences that will require the litigation of substantially separate issues." *Id.* at 81a. The court also concluded that the $145 billion punitive damages award was excessive. *Id.* at 99a-103a. In addition, it held that reversal was required due to the "inherent[ly] inflammatory" jury nullification arguments and racial pandering of respondents' counsel, which "deprived the defendants of due process and a fair trial." *Id.* at 117a-118a. Having reversed on these grounds, the court did not address petitioners' other assignments of error, including Labeling Act preemption.

4. On July 6, 2006, a divided Florida Supreme Court overturned much of the Court of Appeal's decision. App., *infra*, 1a-67a. It unanimously upheld the vacatur of the mas-

sive punitive damages award (App., *infra*, 2a), but a narrow majority concluded, with no analysis, that the "trial court did not abuse its discretion in certifying the class" (*id.* at 27a).[4] The Supreme Court agreed with the Court of Appeal that the predominance of individual issues and "problems with the three-phase trial plan negate the continued viability of this class action." *Id.* at 27a. Nevertheless, it opted for what it termed the "pragmatic solution" of decertifying the class only *prospectively* (*id.* at 30a-31a), invoking, on its own initiative (without briefing or argument) Florida's equivalent of Fed. R. Civ. P. 23(c)(4)(A) to preserve the jury's Phase I findings on various issues (*id.* at 27a-30a).[5] The court ruled that those findings "will have res judicata effect" in new actions to be filed against petitioners by members of the decertified class. *Id.* at 31a. (Class members were given until January 2008 to file their individual cases. *Id.*) Finally, the court reinstated the awards to Farnan and Della Vecchia. *Id.* at 39a-43a.

In dissent, Justice Wells identified the fundamental flaws in the majority's "harmful and confusing" decision. App., *infra*, 57a. The dissent argued that the constitutional defects in both the original trial plan and the majority's "pragmatic so-

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[4] The majority also concluded that the "inappropriate" arguments of respondents' counsel – while "ventur[ing] very close to the line of reversible error" – did not warrant reversal. App., *infra*, 33a. In the course of addressing this issue, the majority made a fleeting reference to preemption, asserting that "[a]lthough compliance with the federal warnings preempted any claim based on failure to warn, it did not eliminate the other causes of action that the jury had to consider in Phase I." *Id.* at 38a.

[5] All Phase I findings were preserved except (1) the findings relating to fraud by affirmative misrepresentation and intentional infliction of emotional distress, which the court acknowledged "involved highly individualized determinations"; and (2) the finding that petitioners engaged in conduct that "would permit a potential award or entitlement to punitive damages." App., *infra*, 31a. The Florida Supreme Court offered no basis for distinguishing other equally individualized determinations, such as the fraudulent concealment and express warranty findings.

lution" required decertification of the class in its entirety and invalidation of all the Phase I findings.

5. Petitioners moved for rehearing, contending, *inter alia*, that the "res judicata" holding violated due process and that the preemption issue required resolution. Respondents' Motion for Rehearing in the Florida Supreme Court (August 7, 2006).[6] Petitioners asked the Florida Supreme Court to vacate the generalized Phase I findings challenged here and to clarify that the Court of Appeal should decide the preemption issue on remand. *Id.* at 30. While slightly altering its original opinion, the Florida Supreme Court denied rehearing without addressing petitioners' due process argument or their request for clarification of the status of preemption. App., *infra*, 187a-189a. On remand, petitioners asked the Court of Appeal to resolve the various issues – including preemption – that had not yet been addressed on appeal. That request was denied without comment. The Florida appellate courts thus have definitively upheld Farnan's and Della Vecchia's compensatory damages awards – and set the stage for significant follow-on litigation – while ignoring petitioners' repeated arguments that respondents' claims are preempted.

[6] In their original briefing, petitioners had pointed out to the Florida Supreme Court that preemption was an independent basis for affirming the Court of Appeal's decision and contended that it would need to be addressed if that decision were reversed. Brief On The Merits Of All Respondents Other Than Liggett And Brooke (July 16, 2004) at 40.

REASONS FOR GRANTING THE PETITION

I. THE FLORIDA SUPREME COURT HAS ABANDONED A FUNDAMENTAL DUE PROCESS LIMITATION ON THE USE OF PRECLUSION.

A. Due Process Prohibits Giving Preclusive Effect To Verdicts That Are Too General To Reveal The Actual Facts That Were Found.

A decade ago, this Court unanimously observed that "extreme applications of the doctrine of res judicata may be inconsistent with a federal right that is fundamental in character." *Richards* v. *Jefferson County*, 517 U.S. 793, 797 (1996) (internal quotation marks omitted). The Court struck down one such extreme application in *Richards* and another in *South Central Bell Telephone Co.* v. *Alabama*, 526 U.S. 160, 168 (1999). See also *Hansberry* v. *Lee*, 311 U.S. 32, 40-46 (1940). The Court's rejections of extreme applications of preclusion are specific instances of the general principle that "abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause." *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 430 (1994); see also *TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443, 457 (1993).

The preclusion ruling here runs afoul of just such limitations by abandoning the deeply rooted principle that a determination in an earlier proceeding cannot be given preclusive effect in a later case unless "it is certain that the precise fact was determined by the former judgment." *De Sollar* v. *Hanscome*, 158 U.S. 216, 221 (1895). This rule was entrenched in English law no later than 1628, when Sir Edward Coke noted that "[e]very estoppell * * * must be certaine to every intent, and [is] not to be taken by argument or inference." 2 COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; OR, A COMMENTARY ON LITTLETON ¶ 352a (London, W. Clarke 1817); see also *The Duchess of*

Kingston's Case, 20 Howell's State Trials 538 (House of Lords 1776) (preclusion requires a determination "directly upon the point" and may not be applied to any finding that can only "be inferred by argument"), quoted in 1 GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 697–698 (10th ed. 1860).

By the time of the Fourteenth Amendment, American courts had uniformly adopted the rule that a party cannot be precluded from litigating an issue in a subsequent case unless the issue has been specifically and ascertainably decided in prior litigation. See, *e.g.*, *Cecil* v. *Cecil*, 19 Md. 72, 1862 WL 2345, at *5 (1862); *Sawyer* v. *Woodbury*, 7 Gray 499, 502-04 (Mass. 1856) (Shaw, C.J.); WELLS, A TREATISE ON THE DOCTRINES OF RES ADJUDICATA AND STARE DECISIS 173 (1878). This Court has repeatedly embraced this fundamental limitation on issue preclusion, consistently refusing to recognize an estoppel where the generality of the verdict or judgment made the underlying findings uncertain. See, *e.g.*, *Russell* v. *Place*, 94 U.S. 606, 608 (1876) (preclusion is unavailable "if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered"); *Cromwell* v. *Sac County*, 94 U.S. 351, 353 (1876) (in applying preclusion the question "must always be" what was "actually litigated and determined in the original action, not what might have been thus litigated and determined").

In *Fayerweather* v. *Ritch*, 195 U.S. 276 (1904), the Court again addressed whether a judgment may be given preclusive effect if it cannot be determined whether the issue on which preclusion is sought was actually decided in the prior litigation. As was necessary to its assertion of jurisdiction under the applicable statute, the Court held that abrogating this limitation on the use of preclusion raised an issue of constitutional dimension. *Id.* at 297-99. Precluding the litigation of issues under those circumstances "is not to be consid-

ered a mere error in the progress of a trial, but a deprivation of property under the forms of legal procedure." *Id.* at 297. *Fayerweather* thus established (*id.* at 307), as a matter of due process, that where

> testimony was offered at the prior trial upon several distinct issues, the decision of any one of which would justify the verdict or judgment, then the conclusion must be that the prior decision is not an adjudication upon any particular issue or issues; and the plea of *res judicata* must fail.

This remains the universal rule today. See, *e.g.*, *Dodge* v. *Cotter Corp.*, 203 F.3d 1190, 1197-99 (10th Cir. 2000) (rejecting application of collateral estoppel where "the general finding under the negligence instruction fails to identify what the jury found sustained by the evidence"); *SEC* v. *Monarch Funding Corp.*, 192 F.3d 295, 309 (2d Cir. 1999) ("when a court cannot ascertain what was litigated and decided, issue preclusion cannot operate"); see also 18 MOORE'S FEDERAL PRACTICE § 132.03[2][g] (3d ed. 1998).

B. The Generalized Phase I Findings Fail To Satisfy The Constitutional Prerequisites For Preclusion.

The Florida Supreme Court's ruling that the Phase I jury findings "will have res judicata effect" in the individual trials brought by former class members squarely conflicts with the foregoing constitutional rule.

1. During the year-long Phase I trial respondents referred to innumerable alleged acts and omissions by multiple companies over at least half a century relating to varied aspects of the design, manufacture, and marketing of cigarettes. Respondents presented scattered incidents of allegedly fraudulent or misleading statements and omissions going back to the 1930s, even though no single class member possibly could have heard or relied on all of them, and even though many class members began smoking long after, or

quit smoking long before, the events occurred. Indeed, the allegations about petitioners' conduct were so broad and numerous, and embraced so many different products and time periods, that the trial judge himself remarked on the inevitable difficulties of determining precisely which acts or omissions, among the "hundreds," "thousands," or even "hundreds of thousands" alleged, related to particular smokers' claims. T.35813-16.

For example, respondents purported to substantiate their negligence and product defect claims by referring to scores of different cigarette types and brands marketed at different times by different manufacturers. The evidence touched upon various cigarettes that yielded high, medium, low, or ultra low amounts of tar and nicotine; filtered and unfiltered cigarettes; cigarettes with and without ventilation holes (pores designed to dilute cigarette smoke) placed at different distances from the tip; cigarettes with and without nicotine; cigarettes containing different flavors, ingredients, and leaf blends; cigarettes processed with ammonia compounds or containing particular tar-to-nicotine ratios; and brands advertised with myriad different slogans and images. *E.g.*, T.25479-519; T.25537-644; T.27574-764; see also Engle Florida Class Mem. of Law in Opp. To Mot. For Directed Verdict on the Issue of Strict Liability 3 (Feb. 4, 2000) (acknowledging diversity of allegations presented in Phase I).[7]

2. Given this sprawling proceeding, petitioners proposed the use of a detailed verdict form that would have required

[7] Respondents' concealment claims were premised on similarly disparate allegations, including, for example, that petitioners failed to disclose (1) information about whether smoking causes disease; (2) information that smokers of light cigarettes "compensated" by inhaling more deeply or smoking more cigarettes; and (3) information about how certain cigarettes were allegedly designed to make them more addictive. See Plaintiffs' Consolidated Resp. to Motions for Directed Verdict on Behalf of the Council for Tobacco Research 25-26 (Mar. 14, 2000).

the jury to return specific findings identifying the particular information that was concealed and the specific acts and products, if any, that were found to be negligent or defective. Certain Defendants' Objections To The Court's Final Verdict Form For Phase I (June 21, 1999). The trial court rejected petitioners' position. As a result, the jury's findings provide no clue as to which of respondents' numerous and disparate assertions the jury accepted or rejected.

As to product defect, for instance, the jury found simply that "all of the defendants sold or supplied cigarettes that were defective," without revealing either the nature of the defect or which of the many cigarette models sold at different times were defective. As to negligence, the jury found merely that "all of the defendants were negligent." This finding is a cipher; no one can say which of the acts or omissions presented at trial the jury actually found to constitute negligence. The findings on concealment are equally cryptic. The jury concluded that petitioners "concealed or omitted material information not otherwise known or available knowing that the material was false or misleading or failed to disclose a material fact concerning the health effects or addictive nature of smoking cigarettes or both." App., *infra*, 44a. This finding is entirely silent as to what items of information or material facts, among the great variety alleged by respondents, were concealed or omitted. *Id.* at 9a-10a.

3. The highly generalized and decidedly ambiguous nature of these findings prevents any other jury from applying them consistent with due process. There simply is no way to identify the actual conduct underlying the Phase I findings or to link that unidentified conduct to the specific claims asserted by any individual plaintiff. For instance, a plaintiff's injury is not caused by negligence in the abstract, but rather by a specific act that a jury finds to have been wrongful. But the Phase I negligence finding points to no such act. Thus, plaintiffs in the follow-on cases will ask judges and juries to indulge in a wholly speculative, but purportedly irrebuttable,

presumption that the generalized findings cover the specific facts and legal theories on which their claims are based. Allowing this shortcut would relieve plaintiffs from establishing certain elements of their claims, without assurance that those elements were resolved by the earlier jury. If left uncorrected, therefore, the preclusion ruling exposes petitioners to liability for conduct that *no* jury actually found wrongful.

Consider, by way of example, a former class member who brings a negligence action against one of the petitioners. Instead of attempting to prove that the conduct relevant to his particular experiences – the placement of ventilation holes on the brand of cigarettes that he smoked, for instance – evinced a lack of reasonable care, the plaintiff simply asserts that the Phase I findings preclusively establish the defendant's negligence. But, as described above, the Phase I jury's generalized conclusion that petitioners "were negligent" cannot be decoded to reveal a determination that any particular defendant was negligent in this particular way. A court could do no more than *guess* that the finding covered the placement of ventilation holes (or any other conduct relevant to the experiences of this individual plaintiff). As this example shows, therefore, applying the abstract Phase I findings to concrete cases necessarily produces verdicts that cannot be said to resolve the elements of any individual's claim.

Accordingly, the present case is paradigmatically one in which "several distinct matters" were litigated, "upon one or more of which the judgment may have passed," but the jury's verdict gives no indication "upon which the judgment was rendered." *Place*, 94 U.S. at 608. Because the first jury's findings cannot be linked to any identifiable evidence or allegations, there is no way even to infer whether that jury adopted any given basis for its liability-related findings that would be applicable to an individual plaintiff in a follow-on case. Cf. *Gasoline Prods. Co.* v. *Champlin Refining Co.*, 283 U.S. 494, 499 (1931) (holding that multiple juries may decide aspects of a single claim only where the issues are "so

distinct and separable" that they can be tried without "confusion and uncertainty, which would amount to a denial of a fair trial"). The Florida Supreme Court's ruling nevertheless gives preclusive effect to those generalized determinations. App., *infra*, 31a. Four hundred years of precedent stand opposed to that result. The Due Process Clause forbids state courts from sacrificing such deeply rooted and fundamental protections at the altar of pragmatism.

C. The Sweeping Consequences Of The Preclusion Ruling Warrant Immediate Review.

Certiorari is warranted because the Florida Supreme Court's preclusion ruling violates this Court's precedents. S. CT. R. 10(c). The need for review is further demonstrated by the number of cases directly affected by the decision below, the waste of resources that would occur if review is deferred, and the potential impact of this case on other large class actions. *E.g.*, *United States* v. *Centennial Sav. Bank FSB*, 499 U.S. 573, 578 n.3 (1991) (certiorari granted "in light of the significant number of pending cases" affected).

The preclusion ruling will be invoked by every former class member filing a claim against petitioners. Indeed, that ruling promises to serve as a catalyst for such litigation, creating incentives for individual suits that otherwise would have been absent. This effect is already being felt, as plaintiffs' lawyers have begun blanketing Florida with solicitations, telling prospective litigants that the scales are now tipped decidedly in their favor. See, *e.g.*, http://www.florida tobaccoattorney.com ("The Florida Supreme Court has made certain findings of fact and law that, in individual lawsuits, could place Florida smokers at a distinct advantage – and Big Tobacco at a distinct disadvantage.").[8]

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[8] This "disadvantage" is illustrated by complaints that have already been filed, which invoke the Florida Supreme Court's preclusion ruling as conclusively establishing that *any* activity relating to the design, manu-

Because the preclusion ruling will both spur and set the terms for these suits, this Court should resolve the significant constitutional issues raised by that ruling now, for the benefit of litigants and courts alike. Unless this Court acts, petitioners face a great many artificial and unfair new suits, in which conventional modes of proof are likely to be significantly distorted. In theory, the Court might postpone consideration of the due process question while these cases wend their way through the courts. But that would entail years of delay and expense, burdening petitioners and the state and federal courts in Florida with suits all predicated on the same unconstitutional ruling. Under these circumstances, where the Florida Supreme Court's preclusion ruling cannot be applied consistent with due process, immediate review is both necessary and efficient.

Finally, the due process issues raised by this case are significant not just in this litigation, but also to federal and state courts throughout the country, which often confront similar questions regarding the allowable procedures for trying mass tort class actions involving a wide array of products. In response to the substantial manageability challenges posed by

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facture, or marketing of *any* cigarettes was tortious. The complaints assert that plaintiffs can recover damages merely by proving that smoking caused their illness. *E.g.*, Compl. For Damages By Intervenors Pasquale Caprio et al. ¶¶ 30, 34-38, 43-48, 53-58, 64-67, *Engle* v. *R.J. Reynolds Tobacco Co.*, No. 94-08273 (Fla. 11th Cir. Ct. Mar. 7, 2007); *Swindell* v. *R.J. Reynolds Tobacco Co.*, No. 07-1171 (Fla. 8th Cir. Ct. Mar. 19, 2007) Compl. ¶¶ 28-40; see also http://www.suebigtobacco.net/knowyourrights.php ("Now those harmed by cigarettes need only prove that smoking caused their own illness in order to recover damages."). The lawyers representing these plaintiffs have asserted that they "collectively represent thousands of other similarly situated Class Members," on whose behalf they state an intention to file similar suits within the period allowed by the Florida Supreme Court. Mot. To Intervene to Assert Claims for Damages and Seek Distribution from Class Fund at 4, *Engle* v. *R.J. Reynolds Tobacco Co.*, No. 94-08273 (Fla. 11th Cir. Ct. Mar. 7, 2007).

such cases, trial courts have experimented with novel procedural devices. See, *e.g.*, *Broussard* v. *Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998); *In re Repetitive Stress Injury Litig.*, 11 F.3d 368, 373 (2d Cir. 1993); *In re Fibreboard Corp.*, 893 F.2d 706, 710-11 (5th Cir. 1990). So too here, the Florida Supreme Court chose to elevate such "pragmatic" considerations above fairness, applying preclusion in a way that courts (including this one) have long disapproved. In light of the proliferation of mass tort class actions, and the unconstitutional litigation that will be spawned by this case itself, this Court's guidance is needed.

II. THE JUDGMENT BELOW UNDERMINES FEDERAL PREEMPTION AND REFLECTS THE WIDESPREAD CONFUSION CAUSED BY THIS COURT'S DECISION IN *CIPOLLONE*.

In the 15 years since this Court's seminal but fractured preemption decision in *Cipollone*, plaintiffs have adopted various tactics in seeking to evade and erode that case's holding, fulfilling Justice Scalia's prophecy that the questions it raised "will fill the lawbooks for years to come." *Cipollone*, 505 U.S. at 556 (Scalia, J., concurring in the judgment in part and dissenting in part). One of those tactics was on display in this case: respondents were allowed to advance claims functionally identical to those held preempted in *Cipollone*, merely by characterizing those claims as involving "fraud" or other traditional causes of action such as negligence. This case thus presents this Court with an opportunity to provide much-needed guidance about the scope of federal preemption in this important context and resolve a significant and recurring issue that has divided the lower courts.

A. Respondents' Claims Are Functionally Equivalent To Those Held Preempted In *Cipollone*.

In the Labeling Act, Congress prescribed the manner and content of manufacturers' warnings of smoking risks, and, to

maintain national uniformity, expressly barred the States from imposing any "requirement or prohibition based on smoking and health * * * with respect to the advertising or promotion of any cigarettes" labeled in accordance with federal law. 15 U.S.C. § 1334(b). (This preemption provision took effect on July 1, 1969. See Pub. L. 91-222, § 3.) In *Cipollone*, this Court held that the Labeling Act preempts state requirements that take the form of common-law duties imposed through private damages actions. 505 U.S. at 522. To determine whether a claim is preempted, courts must "ask whether the legal duty that is the predicate of the common-law damages action constitutes a 'requirement or prohibition based on smoking and health * * * imposed under State law with respect to * * * advertising or promotion.'" *Id.* at 524.

1. Applying this rule, *Cipollone* held that the Act preempts claims that "post-1969 advertising or promotions should have included additional, or more clearly stated, warnings." *Id.* Nevertheless, one of respondents' major themes in this case was that petitioners concealed from smokers information about the health risks of smoking. Throughout Phases I and II-A, respondents asserted that petitioners' inaction left smokers unaware of those risks. For example, during Phase I, one of respondents' experts testified that the cigarette manufacturers knew about "the health risks and addictive qualities of tobacco" but had not disclosed the information to the public" even by the early 1990s. T.13477-78. Other witnesses testified that petitioners failed to warn smokers that nicotine was addictive (T.12020-27; T.13479-80) and that the public was not aware of the health risks of smoking (T.18708-719), or the chemicals found in cigarette smoke (T.18716-17), and particular design features of certain cigarette types (T.16400-01). Respondents' counsel also was allowed to cross-examine petitioners' witnesses as to whether smokers had sufficient health-related information about smoking. *E.g.*, T.27957-58; T.28882-89; T.29261-67. At the end of Phase I, the jury found that petitioners "failed to dis-

close a material fact concerning the health effects or addictive nature of smoking cigarettes." App., *infra*, 7a.

Similarly, the individual plaintiffs testified during Phase II-A about their lack of knowledge of the dangers of smoking, despite Congress's pronouncement that "the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes." 15 U.S.C. § 1331(1). Farnan, for instance, testified that she did not know "how many carcinogens were contained in cigarette smoke," or that ammonia was used in cigarettes, or how nicotine affects the brain. T.40247-51. Relying on this and similar evidence, respondents contended that petitioners should have provided the public with additional health information about smoking beyond that contained in the federally mandated warning labels.

This claim, and the jury findings made in response to it, are invalid under the Labeling Act. Indeed, the Florida courts did here just what *Cipollone* prohibits: They imposed a requirement on petitioners to make public disclosures with regard to smoking and health that go beyond the warning statements prescribed by Congress. Such a requirement is inconsistent with a basic purpose of the Labeling Act – to ensure that cigarette manufacturers' warning requirements remain uniform from State to State. See 15 U.S.C. § 1331.

2. A second crucial aspect of respondents' case was that petitioners' marketing activities allegedly undermined or "neutralized" the federal warning labels, leading class members to believe that smoking was less hazardous than those labels declared. During Phase I, for example, one of respondents' experts testified that the use of "healthy and vigorous" people in tobacco advertising minimized the impact of the warnings on smokers and potential smokers, including minors. T.17265; see also T.11377-78; T.17210. Respondents' counsel drove the point home by arguing that the message

conveyed by cigarette advertising was: "Don't listen to the Surgeon General. Listen to your good friend at Philip Morris who may send you a T-shirt or a cap." T.36657.[9]

The invocation of this theory of liability continued during Phase II-A. Farnan testified that advertisements she saw in the 1960s, '70s, and '80s portrayed smoking as safe and healthy. She added that she had never seen a cigarette ad in which the models were "infirm or disabled in any way." T.42242. Reinforcing the point, an expert opined that "the advertising convinced [Farnan] that cigarette smoking was safe" and that, although she may have seen the warnings, "the advertising basically convinced her that that wasn't true." T.42383-84; see also T.42398-99 (testimony that advertising "prevented [plaintiffs] from actually believing that cigarette smoking was harmful" by keeping "them in a state of conflict and controversy"). This expert also testified that advertising "played a major role" in convincing Della Vecchia to "continu[e] to smoke for an additional 20 years." T.43759-60; see also T.43769 ("I think the advertising of the light cigarettes did convey the message to Mrs. Della Vecchia that smoking those cigarettes would be safer.").

Allowing respondents to pursue this theory of liability was inconsistent with *Cipollone*. Under that decision, the Labeling Act expressly preempts claims asserting that cigarette advertising conveyed a "false impression" that cigarettes are safe, "downplay[ed] the dangers of smoking," or "negate[d] or disclaim[ed]" the federally mandated warning

[9] See also, *e.g.*, T.36436 (argument of respondents' counsel that warnings about the dangers of smoking were ignored "because there is out there this powerful $5 billion a year spent on advertising and promotion, it's like whistling in the wind"). Relatedly, respondents launched frequent attacks on cigarette advertising as "youth marketing" (*e.g.*, T.10480; T.10915-16; T.11376-77; T.13453; T.15882-87; T.16871-81; T.16900; T.17131-54; T.17263-65), even though such attacks are preempted under *Cipollone* and *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525 (2001).

labels. 505 U.S. at 527-28. Such "neutralization" claims are "predicated on a state-law prohibition against statements in advertising and promotional materials that tend to minimize the health hazards associated with smoking." *Id.* at 527. As the Court explained, this theory is the flip-side of a failure-to-warn claim: Just as state courts may not impose liability based on manufacturers' failure to supplement or amplify the warning labels, they may not impose liability based on statements that allegedly dilute those labels. *Id.* (citing 1964 FTC regulations recognizing "the relationship between prohibitions on advertising that downplays the dangers of smoking and requirements for warnings in advertisements").

B. This Court's Review Is Needed To Resolve The Conflict As To Whether Characterizing Failure-To-Warn And Neutralization Claims As Fraudulent Conduct Claims Defeats Preemption.

1. In an effort to circumvent *Cipollone*, respondents characterized the claims described above as attacking "fraudulent concealment," "misrepresentation," or "negligence." The trial court ruled that the incantation of these words sufficed to defeat petitioners' preemption defense. "[T]he record of the trial reflects that the plaintiffs[']' presentation opted for evidence of a 'duty not to deceive' which goes directly to the fraud and conspiracy exception under *Cipollone*, rather than the 'failure to warn' preemption element." App., *infra*, 139a. The court invoked the *Cipollone* plurality's suggestion that some fraudulent misrepresentation claims are predicated on a general "duty not to deceive" and thus are not preempted. 505 U.S. at 528-29.[10] On appeal, the

[10] It was also on this basis that the trial court rejected petitioners' proposed jury instruction, which would have made clear that liability could not be premised on any failure to provide additional information or any neutralization of the federally mandated warnings through advertising or promotion. R. 214: 49274. Instead, the court gave an instruction that said nothing about neutralization and incorrectly told the jury that "fed-

Florida Supreme Court and the Court of Appeal allowed this understanding of federal law to stand without comment.

In so doing, however, the Florida courts deepened a division in the lower courts, placing themselves in conflict with the Fifth and Eleventh Circuits and with two other state supreme courts. These courts have held that plaintiffs cannot avoid preemption by recharacterizing failure-to-warn and neutralization claims as fraud claims. The Texas Supreme Court thus has held that a smoker's claims were preempted where they were "based on the allegation that [a tobacco company] should have provided different warnings or warnings in addition to those mandated by the 1969 Act or that it otherwise concealed the dangers of smoking." *Am. Tobacco Co.* v. *Grinnell*, 951 S.W.2d 420, 439 (Tex. 1997). The fact that the claims were not expressly labeled "failure to warn" did not change the result; rather, the court held that "negligent testing" and "fraudulent concealment" claims were preempted because they were all premised on the manufacturer's "failure to disclose information regarding the dangers of cigarettes." *Id.* at 439-40. The Alabama Supreme Court reached the same conclusion, holding that failure-to-warn claims, even if labeled as "fraudulent suppression" claims, are "clearly" preempted by federal law. *Cantley* v. *Lorillard Tobacco Co.*, 681 So. 2d 1057, 1061 (Ala. 1996).

Similarly, the Fifth Circuit recently rejected efforts to avoid preemption by recasting a claim of failure to warn as fraudulent concealment. See *Brown* v. *Brown & Williamson*

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eral law does not limit the liability of any defendant against claims based on negligence, strict liability, express warranty, fraud, misrepresentation, or conspiracy." T.37569-70. This instruction permitted respondents' failure-to-warn and neutralization claims to escape preemption so long as they were labeled as "fraud" or "misrepresentation" claims or packaged as part of a strict liability, negligence, or express warranty claim. In dicta, the Florida Supreme Court echoed this flawed understanding of Labeling Act preemption. App., *infra*, 38a.

Tobacco Corp., 479 F.3d 383 (5th Cir. 2007). The court observed that "most courts have held that any state law claim that would require additional communication between companies and consumers is pre-empted by the Labeling Act." *Id.* at 393. Such a claim – even if described in terms of concealment – "relies, by its nature, on an unfulfilled duty to disclose additional information" and thus is preempted. *Id.* at 394; see also *Allgood* v. *R.J. Reynolds Tobacco Co.*, 80 F.3d 168, 171 (5th Cir. 1996); *Lacey* v. *Lorillard Tobacco Co.*, 956 F. Supp. 956, 962-64 (N.D. Ala. 1997).

The same is true of neutralization claims; since *Cipollone*, most state and federal courts have rejected plaintiffs' attempts to evade preemption by characterizing neutralization claims as false or deceptive advertising claims. In *Grinnell*, for instance, the Texas Supreme Court held that a deceptive advertising claim was preempted, finding that it was "properly characterized as a neutralization claim because [defendant] allegedly made the deceptive statements in its advertising and promotional materials with the intent of diminishing the impact of the federal warnings." 951 S.W.2d at 440. The Fifth and Eleventh Circuits agree. See *Brown*, 479 F.3d at 392 ("implied misrepresentation" claim preempted as equivalent to the neutralization claims discussed in *Cipollone*); *Spain* v. *Brown & Williamson Tobacco Corp.*, 363 F.3d 1183, 1202 (11th Cir. 2004) (reading *Cipollone* as requiring preemption of claims alleging "fraudulent suppression" and "conspiracy to fraudulently misrepresent"). These courts have recognized that they "must look beyond the descriptive label a plaintiff attaches to a claim in determining whether or not the claim is preempted." *Lacey*, 956 F. Supp. at 963.

2. The approach to Labeling Act preemption taken in this case is directly at odds with these decisions. In allowing claims to survive preemption even though they rest on a duty to disclose additional health-related information through cigarette advertising and promotion, the Florida courts cast their lot with a minority of courts that have adopted the same

reading of *Cipollone*. App., *infra*, 208a-215a (listing published decisions since *Cipollone* in which the issue has arisen). This division of authority, combined with the frequency with which this issue arises, requires the Court's attention. The conflict is particularly significant given that the Florida courts' approach to preemption is now at odds with that of the Eleventh Circuit. See *Baldwin* v. *Alabama*, 472 U.S. 372, 374 (1985) (conflict between state and federal courts in the same State is a compelling reason for review).

Moreover, as the lower-court case law reveals, there remains considerable and recurring confusion about how to apply the Labeling Act in this important context. That is not altogether surprising. *Cipollone* was a splintered decision, and *five* of the Justices who participated in that case rejected the plurality's distinction between failure-to-warn claims and fraud claims.[11] The plurality itself admitted that its position lacked "theoretical elegance." 505 U.S. at 529 n.27. This led Justice Blackmun to anticipate the "difficulty lower courts will encounter in attempting to implement today's decision." *Id.* at 543-44; see, *e.g.*, *Whiteley* v. *Philip Morris Inc.*, 117 Cal. App. 4th 635, 670 (1st Dist. 2004) (under *Cipollone* "[l]ine drawing is difficult as each side of the continuum has the capacity to swallow the other"); *Good* v. *Altria Group, Inc.*, 436 F. Supp. 2d 132, 142 (D. Maine 2006) ("courts remain divided about what [*Cipollone*] means and how to apply it"). Only this Court can put an end to this accumulating difficulty, which arises in most cases brought by smokers, by making clear that claims attacking a failure to add to the federally mandated warnings are preempted, regardless of the name given to those claims.

That certainly is the better reading of the Labeling Act and of *Cipollone*. What matters under the Act is the substan-

[11] See 505 U.S. at 543 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part); *id.* at 553 (Scalia, J., concurring in the judgment in part and dissenting in part).

tive requirement the claim seeks to impose. And the suggestion that any claim, regardless of its substance, containing an assertion of "fraud" survives preemption is inconsistent with *Cipollone*'s recognition that the Labeling Act does not compartmentalize preemption into "any familiar subdivision of common-law claims." 505 U.S. at 523. Indeed, *Cipollone* expressly held that one of the plaintiff's claims was preempted even though it involved a theory of "fraudulent misrepresentation." *Id.* at 527-28. This makes sense; smokers should not be allowed to make an end-run around the Labeling Act simply by altering the names given to their claims. Cf. *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 214 (2004) (rejecting attempts to re-label claims to evade preemption).

It is true that the *Cipollone* plurality stated that certain fraud claims "are predicated not on a duty 'based on smoking and health' but rather on a more general obligation – the duty not to deceive," and on that basis escape preemption. 505 U.S. at 528-29. In context, however, this aspect of the plurality opinion is focused on claims alleging "fraud by intentional misstatement," that is, claims challenging *affirmative* "false statements of material fact." *Id.* By contrast, the plurality stated that fraudulent *concealment* claims escape preemption only "insofar as those claims rely on a state-law duty to disclose such facts through channels of communication other than advertising or promotion" – as in a disclosure to a public agency. *Id.* at 528. Had the plurality believed that concealment claims avoid preemption simply because – like affirmative fraud claims – they rest on a general duty not to deceive, this caveat about alternative channels would have been wholly unnecessary.[12]

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[12] Any effort by respondents to evade preemption by arguing that their concealment claims did not involve "advertising or promotion" could have been upheld only by exacerbating an existing and acknowledged circuit split. Compare *Brown*, 479 F.3d 393-95; *Spain*, 363 F.3d at 1197; and *Cantley*, 681 So. 2d at 1061 (any claim requiring additional commu-

C. The State Appellate Courts' Failure To Address The Preemption Issue Does Not Render This Case Unworthy Of Review.

In addition to the "importance of the questions presented and conflicting views in the courts of appeals and the district courts," *Calhoon* v. *Harvey*, 379 U.S. 134, 137 (1964), certiorari is warranted here in light of the manifest disregard that the Florida courts showed for federal preemption. Confronted with petitioners' preemption arguments, the trial judge remarked that the "whole concept of *Cipollone* is terrible and wrong" (T.27878), which makes "truth and justice impossible," and declared that "I have to figure out how to get around it" (T.16621-22). On appeal, both the Florida Supreme Court and the Court of Appeal remained silent in the face of repeated pleas that the trial court's preemption errors had to be corrected. Thus, despite multiple opportunities to act and without any explanation, those courts acquiesced in the subversion of controlling federal law and in the rejection of contrary authority from state and federal courts.

Such disregard of both federal law and proper appellate procedure only reinforces the need for this Court's intervention. Had the Florida Supreme Court expressly addressed and rejected petitioners' preemption claims, the conflict between its decision and the decisions of this and other courts would have been obvious. Review is no less appropriate merely because that court abdicated its responsibilities by affirming judgments contrary to the federal Constitution and statutes without addressing those claims. Few things could be more destabilizing for the rule of law, and for the supremacy of federal law, than for state courts to be able to disregard this Court's pronouncements – and simultaneously

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nications with the public is preempted); with *Rivera* v. *Philip Morris, Inc.*, 395 F.3d 1142, 1148 (9th Cir. 2005) (interpreting "advertising and promotion" narrowly to avoid preempting claims based on omissions from channels such as media reports and public service announcements).

evade this Court's review – simply by refusing to consider federal issues presented to them.

Indeed, because petitioners are entitled to have their federal claims actually considered, this Court should, at a minimum, grant certiorari, vacate the judgment below, and remand the case for consideration of the preemption issue by the Florida appellate courts. As this Court has observed, a GVR "assists the court below by flagging a particular issue that it does not appear to have fully considered" and "assists this Court by procuring the benefit of the lower court's insight before we rule on the merits." *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996); see also *Youngblood* v. *West Virginia*, 126 S. Ct. 2188, 2190 (2006) (using GVR where state supreme court failed to address federal issue presented to it).

Finally, the state appellate courts' unexplained refusal to enforce petitioners' federal rights did more than permit two individual plaintiffs to prevail on preempted theories of liability. By virtue of the Florida Supreme Court's flawed preclusion ruling, the stage has been set for former members of this enormous class to avail themselves of findings that were irredeemably tainted by the same preempted theories. If certiorari is not granted, the Florida courts' disregard for federal preemption will subject petitioners to adverse judgments based on those theories in all the follow-on cases to which the Florida Supreme Court has given the green light. This result requires correction by this Court *before* petitioners and courts across Florida are subjected to the burdens associated with a long series of inherently defective trials.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

[Opinion of the Supreme Court of Florida (December 21, 2006)]

Supreme Court of Florida

No. SC03-1856

Howard A. ENGLE, M.D., et al.,
Petitioners,

vs.

LIGGETT GROUP, INC., et al.,
Respondents.

[December 21, 2006]

REVISED OPINION

PER CURIAM.

This case arises from the Third District Court of Appeal's reversal of a final judgment entered in a smokers' class action lawsuit that sought damages against cigarette companies and industry organizations for alleged smoking-related injuries. See Liggett Group, Inc. v. Engle, 853 So.2d 434 (Fla. 3d DCA 2003) (hereinafter "Engle II"). The final judgment awarded $12.7 million in compensatory damages to three individual plaintiffs and $145 billion in punitive damages to the entire class. See id. at 441. We have jurisdiction because Engle II misapplies our decision in Young v. Miami Beach Improvement Co., 46 So.2d 26 (Fla.1950). See art. V, § 3(b)(3), Fla. Const.

For the reasons explained more fully in this opinion, although we approve the Third District's reversal of the $145

billion class action punitive damages award, we quash the remainder of the Third District's decision. A majority of the Court **(Anstead, Pariente, Lewis and Quince)** holds that the compensatory damages award in favor of Mary Farnan in the amount of $2,850,000 and Angie Della Vecchia in the amount of $4,023,000 should be reinstated. However, the court unanimously agrees that the compensatory damages award in favor of Frank Amodeo must be vacated based on the statute of limitations.

Further, a majority of the Court **(Anstead, Pariente, Lewis and Quince)** concludes that Engle II misapplied our decision on the law of the case doctrine in Florida Department of Transportation v. Juliano, 801 So.2d 101, 106 (Fla. 2001); that the certification of the class action and the Phase I trial process were not abuses of the trial court's discretion; and that certain common liability findings can stand. However, we also conclude that the remaining issues, including individual causation and apportionment of fault among the defendants, are highly individualized and do not lend themselves to class action treatment. Thus, we remand with directions that the class should be decertified without prejudice to the class members filing individual claims within one year of the issuance of our mandate in this case with res judicata effect given to certain Phase I findings.

More specifically, we hold as follows:

PUNITIVE DAMAGES: We unanimously hold that the Third District erred in concluding that under Young the class action punitive damages claims were barred by the settlement agreement between the State of Florida and many of the defendants involved in the present action (Florida Settlement Agreement or FSA). However, we vacate the punitive damages award because we unanimously conclude that the punitive damages award is excessive as a matter of law.

A majority of the Court **(Anstead, Pariente, Lewis, and Quince)** also concludes that the Third District misapplied

Ault v. Lohr, 538 So.2d 454, 456 (Fla. 1989), by holding that compensatory damages must be determined before a jury can consider entitlement to punitive damages. Although Justices Lewis and Quince would allow the finding of entitlement to punitive damages to stand, a different majority of the Court **(Wells, Anstead, Pariente, and Bell)** concludes that the trial court erred in allowing the jury to make this finding during Phase I because, consistent with Ault, proof of liability, which includes both reliance and causation, is a predicate to the determination of entitlement to punitive damages.

PHASE I FINDINGS: A majority of the Court **(Anstead, Pariente, Lewis, and Quince)** concludes that the Third District erred as a matter of law in conducting a plenary review of the trial court's decision to certify the Engle Class after completion of an extended Phase I trial and after a different panel of the Third District upheld the certification.[1] This same majority concludes that it was proper to allow the jury to make findings in Phase I on Questions 1 (general causation), 2 (addiction of cigarettes), 3 (strict liability), 4(a) (fraud by concealment), 5(a) (civil-conspiracy-concealment), 6 (breach of implied warranty), 7 (breach of express warranty), and 8 (negligence). Therefore, these findings in favor of the Engle Class can stand. The Court unanimously agrees that the nonspecific findings in favor of the plaintiffs on Questions 4 (fraud and misrepresentation) and 9 (intentional infliction of emotional distress) are inadequate to allow a subsequent jury to consider individual questions of reliance and legal cause. Therefore, these findings cannot stand. Because the finding in favor of the plaintiffs on Question 5 (civil conspiracy-misrepresentation) relies on the underlying tort of misrepresentation, this finding also cannot stand.

ARGUMENTS OF ENGLE CLASS'S COUNSEL: A majority of the Court **(Anstead, Pariente, Lewis, and**

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[1] Justices Wells and Bell would affirm the Third District as to its conclusions regarding the class action.

Quince) disagrees with the Third District's conclusion that the plaintiffs' counsel's improper arguments require reversal, but we condemn in no uncertain terms some of these arguments. We do not address the Phase II arguments because we are reversing the punitive damages award from Phase II-B and the defendants do not raise any error with respect to arguments made during Phase II-A, in which the jury determined the individual compensatory damages of three class representatives.

CLASS CERTIFICATION CUT-OFF DATE: While a majority **(Anstead, Pariente, Lewis, and Quince)** agrees that the class cannot be open-ended, we disagree with the Third District's ruling that the appropriate cut-off date for class membership is October 31, 1994, the date the class was initially certified. We conclude that the date of the trial court's November 21, 1996, order that recertified a narrower class is the appropriate cut-off date.

JUDGMENT FOR CLASS MEMBERS: Because Mary Farnan, who was diagnosed with lung cancer in April 1996, is clearly a proper member of the class, the Third District erred in reversing the compensatory verdict in favor of Farnan in the amount of $2,850,000, except as against Liggett Group Inc. and Brooke Group Holding Inc., whom the jury found to be zero percent at fault. We thus approve the Third District's conclusion that a directed verdict should be granted in favor of Liggett and Brooke.

As for Angie Della Vecchia, she was diagnosed with lung cancer in early 1997. However, at that time, it was also noted by her doctors that she had a past medical history of chronic obstructive pulmonary disease ("COPD") and significant hypertension. Because two of the diseases at issue in this case are coronary heart disease and COPD, Della Vecchia's medical records indicate that she had been suffering from a tobacco related disease prior to the time of certification and is therefore properly included as a class member. The jury specifically found that her lung disease was caused

by smoking. Thus, a majority of the Court concludes that the compensatory judgment in favor of Della Vecchia in the amount of $4,023,000 should stand, except as against Liggett and Brooke, who were found to be zero percent at fault.[2] The Court unanimously agrees with the Third District that the final judgment in favor of class representative Frank Amodeo must be reversed because all of Amodeo's claims are barred by the statute of limitations.

With the summary of this Court's holdings set forth above, we now turn to a more in-depth discussion of the background of this case and the salient issues.

FACTS AND PROCEDURAL HISTORY

On October 31, 1994, the trial court certified as a nationwide class action a group of smokers and their survivors under Florida Rule of Civil Procedure 1.220(b)(3). The class representatives on behalf of themselves, and all others similarly situated, filed an amended class action complaint seeking compensatory and punitive damages against major domestic cigarette companies and two industry organizations (hereinafter collectively referred to as "Tobacco") for injuries allegedly caused by smoking.[3]

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[2] We also note that the defendants never objected to Farnan or Della Vecchia as a proper members of the class. Although the defendants opposed the Engle Class's 1998 motion to add thirteen class representatives, which listed Farnan and Della Vecchia, their arguments focused on the timeliness of the motion and on the fact that adding thirteen new class representatives was unnecessary. The defendants did state that the brief descriptions of the proposed new class representatives that were provided by the plaintiffs did not indicate that "they would be adequate class representatives, whose claims are not time-barred." However, the defendants did not argue that any of the proposed class representatives, including Farnan and Della Vecchia, were not proper members of the class because of the class cut-off date.

[3] The cigarette companies are: R.J. Reynolds Tobacco Company; RJR Nabisco, Inc.; Philip Morris Incorporated (Philip Morris

The trial court defined the class as: "All United States citizens and residents, and their survivors, who have suffered, presently suffer or who have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine." Tobacco filed an interlocutory appeal of the trial court's order certifying the Engle Class pursuant to Florida Rule of Appellate Procedure 9.130(a)(6). See R.J. Reynolds Tobacco Co. v. Engle, 672 So.2d 39, 40 (Fla. 3d DCA 1996) (hereinafter "Engle I"). On January 31, 1996, the Third District affirmed the trial court's order certifying the class but reduced the class to include only Florida smokers. See id. at 42 (striking "[a]ll United States citizens and residents" provision and substituting in its place "[a]ll Florida citizens and residents"). Tobacco's petition for review by this Court was denied. See R.J. Reynolds Tobacco Co. v. Engle, 682 So.2d 1100 (Fla. 1996).

On February 4, 1998, the trial court issued a trial plan, dividing the trial proceedings into three phases. Phase I consisted of a year-long trial to consider the issues of liability and entitlement to punitive damages for the class as a whole. See Engle II, 853 So.2d at 441. The jury considered common issues relating exclusively to the defendants' conduct and the general health effects of smoking. See id. On July 7, 1999, at the conclusion of Phase I, the jury rendered a verdict for the Engle Class and against Tobacco on all counts.[4]

U.S.A.); Philip Morris Companies, Inc.; Lorillard Tobacco Company; Lorillard, Inc.; Brown & Williamson Tobacco Corporation, individually and as successor by merger to The American Tobacco Company; Liggett Group Inc.; Brooke Group Holding Inc., and Dosal Tobacco Corp. The industry organizations are The Council for Tobacco Research-U.S.A., Inc., and The Tobacco Institute, Inc. because of the class cut-off date.

[4] The Phase I findings were: (1) that cigarettes cause some of the diseases at issue; (2) that nicotine is addictive; (3) that the defendants placed cigarettes on the market that were defective and unreasonably dangerous; (4) that the defendants made a false or mis-

Phase II was divided into two subparts—Phase II-A and Phase II-B. Phase II-A was intended to resolve the issues of entitlement and amount of compensatory damages, if any, that the three individual class representatives—Frank Amodeo, Mary Farnan, and Angie Della Vecchia—should receive. Phase II-B was designed to result in a jury determination of a total lump sum punitive damage award, if any, that should be assessed in favor of the class as a whole.

At the conclusion of Phase II-A, the jury determined that the three individual class representatives were entitled to compensatory damages in varying amounts, which were offset by their comparative fault. The total award was $12.7 million. The jury subsequently determined in Phase II-B the lump-sum amount of punitive damages for the entire class to be $145 billion, without allocation of that amount to any

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leading statement of material fact with the intention of misleading smokers; (4)(a) that the defendants concealed or omitted material information not otherwise known or available knowing that the material was false or misleading or failed to disclose a material fact concerning the health effects or addictive nature of smoking cigarettes or both; (5) that all of the defendants agreed to misrepresent information relating to the health effects of cigarettes or the addictive nature of cigarettes with the intention that smokers and the public would rely on this information to their detriment; (5)(a) that the defendants agreed to conceal or omit information regarding the health effects of cigarettes or their addictive nature with the intention that smokers and the public would rely on this information to their detriment; (6) that all of the defendants sold or supplied cigarettes that were defective; (7) that all of the defendants sold or supplied cigarettes that at the time of the sale or supply did not conform to representations of fact made by the defendants; (8) that all of the defendants were negligent; (9) that all of the defendants engaged in extreme and outrageous conduct or with reckless disregard relating to cigarettes sold or supplied to Florida smokers with the intent to inflict severe emotional distress; and (10) that all of the defendants' conduct rose to a level that would permit an award of punitive damages.

class member. Tobacco filed several post-verdict motions, including a motion at the conclusion of phase II-B for a new trial or remittitur, a motion to set aside the verdict, and for entry of judgment, and another motion to decertify the class. See Engle v. R.J. Reynolds Tobacco, No. 94-08273 CA-22 (Fla. 11th Cir. Ct. Nov. 6, 2000) (hereinafter "Engle F.J."), rev'd, 853 So.2d 434 (Fla. 3d DCA 2003).

On November 6, 2000, the trial court entered a final judgment and amended omnibus order, in which it granted judgment in Tobacco's favor in two respects. First, the trial court granted Tobacco's motion for directed verdict on a statute of limitations basis with regard to named plaintiff Frank Amodeo on the counts based on strict liability, implied warranty, express warranty, negligence, and intentional infliction of emotional distress. However, the trial court ruled that Amodeo's fraud and conspiracy claims were not time-barred. Second, the court granted Tobacco's motion for directed verdict with regard to count seven of the complaint, in which the Engle Class sought equitable relief, upon the basis that the count had previously been dismissed by the court. The court entered judgment in favor of the Engle Class on all other counts, ordered immediate payment to the individual plaintiffs, and directed Tobacco to pay the $145 billion in punitive damages into the registry of the Dade County Circuit Court for the benefit of the entire class.

According to the trial plan, in Phase III, new juries are to decide the individual liability and compensatory damages claims for each class member (estimated to number approximately 700,000). See Engle II, 853 So.2d at 442. Thereafter, the plan contemplated that the trial court would divide the punitive damages previously determined equally among any successful class members. Pursuant to the omnibus order, interest on the punitive award began accruing immediately. See id.

Tobacco filed an appeal and the Third District reversed the final judgment with instructions that the class be decertified. See id.

ANALYSIS

1. Res Judicata

A. History of the Florida Settlement Agreement and the Master Settlement Agreement

In 1995, the State of Florida and others (hereinafter "State") filed a complaint against many of the defendants involved in the present action (hereinafter "FSA Defendants").[5] This earlier action was initiated by the State under the Medicaid Third-Party Liability Act, section 409.910, Florida Statutes (1995). In its complaint, the State alleged counts of negligence, strict liability in tort, injunctive relief, various statutory and criminal violations, and violations of the Florida RICO Act. The State sought reimbursement of Medicaid monies expended in treating the victims of tobacco-related illnesses as well as other damages permitted by law, including punitive damages where available. Subsequent to the filing of the State's complaint, the circuit court granted the FSA

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[5] The named plaintiffs in the State's suit were: The State of Florida; Lawton Chiles, Jr., Individually and as Governor; the Department of Business and Professional Regulation; the Agency for Health Care Administration; and the Department of Legal Affairs. award of punitive damages.

The named defendants in the State's suit were: The American Tobacco Company; R.J. Reynolds Tobacco Company; RJR Nabisco, Inc.; B.A.T. Industries, PLC; Batus Holdings, Inc.; Brown & Williamson Tobacco Corporation; Philip Morris Companies, Inc.; Philip Morris Incorporated (Philip Morris U.S.A.); Loews Corporation; Lorillard Tobacco Company; United States Tobacco Company; UST Inc.; The Council for Tobacco Research-U.S.A. Inc. (successor to Tobacco Institute Research Committee); The Tobacco Institute, Inc.; Hill & Knowlton, Inc.; British American Tobacco Co., Ltd.; and Dosal Tobacco Corp., Inc.

Defendants' motion for summary judgment and dismissed all claims by the State for punitive damages with the exception of its claim for punitive damages contained in count four of the complaint alleging only statutory and criminal violations.[6]

In 1997, the State and the FSA Defendants entered into the Florida Settlement Agreement, which resolved "all present and future civil claims against all parties to [the] litigation relating to the subject matter of [the] litigation, which [were] or could have been asserted by any of the parties [thereto]." (Emphasis supplied.) Pursuant to the terms of the FSA, in exchange for agreeing to resolve these claims, the State received $550 million for unspecified purposes, $200 million for a pilot program by the State of Florida aimed at the reduction of the use of tobacco products by minors, several billion dollars paid out over a period of time for the benefit of the State of Florida, and injunctive relief. As stated by the FSA, the monies received "constitute[d] not only reimbursement for Medicaid expenses incurred by the State of Florida, but also settlement of all of Florida's other claims, including those for punitive damages, RICO and other statutory theories." Also included in the FSA was a "Non-Admissibility" provision which provided:

> These settlement negotiations have been undertaken by the parties in good faith and for settlement purposes only, and neither this Settlement Agreement nor any evidence of negotiations hereunder, shall be offered or received in evidence in this Action, or any other action or proceeding, for any purpose

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[6] Specifically, count four contained allegations that the defendants violated the Florida Drug and Cosmetic Act, statutory provisions prohibiting the wrongful targeting of minors, statutory provisions prohibiting fraudulent practices, statutory provisions prohibiting public nuisances, and the Florida Deceptive and Unfair Trade Practices Act.

other than in an action or proceeding arising under this Settlement Agreement.

During the time period in which Florida pursued an action against the FSA Defendants, several other states also initiated actions against the FSA Defendants for similar if not identical claims. These states settled their claims against the FSA Defendants in November of 1998 when all parties to that action entered into a Master Settlement Agreement (the "MSA"). The MSA released all claims of the participating states and also included a "Non-Admissibility" provision similar to that in the FSA. Under the MSA, the FSA Defendants are required to pay certain participating states more than $200 billion over the first twenty-five years, with additional amounts to be paid in perpetuity after that.

B. Res Judicata Effect of the FSA

The Third District in this case held that the punitive damages claims of the Engle Class were precluded by the FSA. See Engle II, 853 So.2d at 467. The district court reasoned that Florida, in agreeing to relinquish its claims through the FSA, had effectively resolved a matter of general interest to all of its citizens and, therefore, the FSA was binding upon all citizens even though they were not parties to the original litigation. See id. at 468. The district court therefore concluded that the FSA's "release, and the res judicata effect of the resulting final judgment, preclude[d] the [Engle Class's] punitive-damage claims here." Id.

We agree with the Third District that whether the application of res judicata was proper is a question of law. See id. at 468. We therefore apply a de novo standard of review. See D'Angelo v. Fitzmaurice, 863 So.2d 311, 314 (Fla.2003) (stating that standard of review for pure questions of law is de novo).

The doctrine of res judicata serves an important purpose in the judicial system of this state. The foundation of res judicata is that a final judgment in a court of competent juris-

diction is absolute and settles all issues actually litigated in a proceeding as well as those issues that could have been litigated. We have explained the doctrine of res judicata as follows:

> A judgment on the merits rendered in a former suit between the same parties or their privies, upon the same cause of action, by a court of competent jurisdiction, is conclusive not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action.

Fla. Dep't of Transp. v. Juliano, 801 So.2d 101, 105 (Fla.2001) (alteration in original) (quoting Kimbrell v. Paige, 448 So.2d 1009, 1012 (Fla. 1984)).

In Young, this Court held that citizens of the City of Miami Beach were bound by a judgment against the city that enjoined the city from asserting any interest in a particular parcel of oceanfront property. See 46 So. 2d at 30. An association of citizens of the City of Miami Beach filed an action to determine the public's interest in this parcel, which was owned by the defendant, a private corporation. See id. at 26. In holding that the claim was barred by the prior decree enjoining the City, we noted that a "judgment against a municipal corporation in a matter of general interest to all its citizens is binding on the latter, although they are not parties to the suit." Id. at 30 (emphasis supplied) (quoting 38 Am. Jur. § 728).

Similarly, in Castro v. Sun Bank of Bal Harbour, 370 So.2d 392, 393 (Fla. 3d DCA 1979), the Third District held that private parties were precluded from relitigating public nuisance and zoning violation claims that had already been settled by the State. The district court reasoned that the plaintiffs were bound by the final judgment of the prior action "irrespective of whether they were formal parties to the

. . . action" because they were "citizens of the State of Florida and the City of Miami at the time of the [prior] litigation." Id.

The district court, as well as Tobacco, relied on Young and Castro to support the position that the FSA is binding on all citizens of the State of Florida. However, in both of these cases the governmental entity was asserting interests of concern common to all of its citizens: the public's interest in oceanfront property and public nuisance and zoning violations. Application of res judicata in these contexts is supported by precedent that has established that for a State to bind its citizens as a result of litigation advanced by the State, the government must be suing in its parens patriae capacity, litigating the rights or interests common to the public at large and thereby representing the citizenry of the State. See Satsky v. Paramount Commc'ns, Inc., 7 F.3d 1464, 1470 (10th Cir.1993). The Eleventh Circuit Court of Appeals appropriately described this form of action when it stated:

> "In order to maintain [a parens patriae] action, the State must articulate an interest apart from the interests of particular private parties, i.e., the State must be more than a nominal party. The State must express a quasi-sovereign interest." Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel. Barez, 458 U.S. 592, 607, 102 S.Ct. 3260, 3268, 73 L.Ed.2d 995 (1982). "Parens patriae standing has been explained on the ground that the plaintiff state is not merely advancing the rights of individual injured citizens, but has an additional sovereign or quasi-sovereign interest." 17 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure: Jurisdiction 2d § 4047 at 223 (1988). Although the Supreme Court has not expressly defined what is a "quasi-sovereign" interest, it is clear that a state may sue to protect its citizens against "the pollution of the air over its territory; or of interstate wa-

> ters in which the state has rights." 12 Moore's Federal Practice ¶ 350.02[3] at 3-20 (1993). It is equally clear, however, that a state may not sue to assert the rights of private individuals. See Alfred L. Snapp, 458 U.S. at 600, 102 S.Ct. at 3265; Pennsylvania v. New Jersey, 426 U.S. 660, 665, 96 S.Ct. 2333, 2335, 49 L.Ed.2d 124 (1976); New York by Abrams v. Seneci, 817 F.2d 1015, 1017 (2nd Cir.1987); Illinois v. Life of Mid-America Ins. Co., 805 F.2d 763, 766 (7th Cir.1986), 13A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure: Jurisdiction 2d § 3531.11 at 19 (1984).

Id. at 1469 (alteration in original).

In Satsky, the court analyzed an action in which a group of property owners alleged a variety of private property claims arising from the defendant's operation of a mine. See id. at 1466. The defendant claimed that a consent decree between itself and the State of Colorado precluded the plaintiffs' claims. See id. at 1467. In reversing a final summary judgment entered by the lower court for the defendant, the court held that "[t]o the extent [the] claims involve injuries to purely private interests, which the State cannot raise, then the claims are not barred." Id. at 1470. We agree with the reasoning of Satsky and with the principle that "litigation by a government agency will not preclude a private party from vindicating a wrong that arises from related facts but generates a distinct individual cause of action." Southwest Airlines Co. v. Texas Intern. Airlines, Inc., 546 F.2d 84, 98 (5th Cir.1977).

In the litigation that resulted in the FSA, the State, in support of its claim for punitive damages, alleged knowing and intentional dissemination of false, fraudulent and misleading statements to the general public by the FSA Defen-

dants in violation of section 817.41, Florida Statutes (1995).[7] In the present case, the Engle Class relied on legal theories that were based on injuries personal to the class members to support the claim for punitive damages. Since the State had no right to pursue these types of private interests on behalf of its citizens, the punitive damages claims settled by the State in the FSA, if any, were distinct from the punitive damages sought by the Engle Class in the present case.

The reasoning in In re Exxon Valdez, 270 F.3d 1215 (9th Cir.2001), is instructive. In that case, the defendants appealed a punitive damages award for claims arising out of the Exxon Valdez oil spill. See id. at 1221. The plaintiffs consisted of separate classes of commercial fishermen, Alaskan natives, and landowners affected by the spill. See id. at 1225. These distinct classes sought compensatory and punitive damages for injuries resulting from the Exxon Valdez spill. See id. The jury returned a verdict in favor of the plaintiffs which assessed $287 million in compensatory damages and $5 billion in punitive damages. See id. Exxon appealed the resulting judgment, asserting that the punitive damages award was barred by the res judicata effect of a consent decree between Exxon and the United States and the State of Alaska that settled claims in a previous action filed under the Clean Water Act. See id. at 1227. In holding that the award was not barred by the previous settlement, the court concluded that the interests asserted by the plaintiffs were distinct from those asserted by the United States and Alaska in the prior action. See id. at 1228. The court, relying on Satsky, noted that the prior consent decree addressed harms caused to the environment and the general public whereas the claims in the class action were to vindicate

[7] The State's only claim for punitive damages arose from the alleged violation of this Florida statutory provision prohibiting misleading advertising. None of the other statutory provisions alleged to be violated by the FSA Defendants in count four of the State's complaint allowed the recovery of punitive damages.

wrongs that resulted in individual injuries. See In re Exxon Valdez, 270 F.3d at 1227-28. Moreover, the court stressed that although the consent decree "released all government claims, [it] provides explicitly that 'nothing in this agreement, however, is intended to affect legally the claims, if any, of any person or entity not a Party to this Agreement.'" Id. at 1227. The FSA expressly provided that neither the agreement itself "nor any evidence of negotiations [t]hereunder, shall be offered or received in evidence in this Action, or any other action or proceeding, for any purpose other than in an action or proceeding arising under this Settlement Agreement." The facts of In re Exxon are similar to the circumstances presented in this case and support our conclusion that the Third District erred in holding that the FSA barred the Engle Class's punitive damages claim.

2. Punitive Damages Award

Although we conclude that the Third District erred in applying the doctrine of res judicata to bar the Engle Class's punitive damages claim, we must vacate the classwide punitive damages award because we unanimously agree with the Third District that the trial court erred in allowing the jury to determine a lump sum amount before it determined the amount of total compensatory damages for the class. As a matter of law, the punitive damages award violates due process because there is no way to evaluate the reasonableness of the punitive damages award without the amount of compensatory damages having been fixed. The amount awarded is also clearly excessive because it would bankrupt some of the defendants. A majority of the Court further concludes that the trial court erred in allowing the jury to consider entitlement to punitive damages during the Phase I trial. We address these issues separately.

A. Phase I Finding on Entitlement to Punitive Damages

The last question on the Phase I verdict form asked the jury to determine whether "[u]nder the circumstances of this case, . . . the conduct of any Defendant rose to a level that would permit a potential award or entitlement to punitive damages." The jury answered "yes" with respect to each of the defendants. In Phase II-B, the jury awarded a total of $145 billion in punitive damages to the class.

The Third District ruled that the trial erred in awarding classwide punitive damages "without the necessary findings of liability and compensatory damages." Engle II, 853 So.2d at 450. A majority of the Court **(Anstead, Pariente, Lewis, and Quince)** concludes that an award of compensatory damages is not a prerequisite to a finding of entitlement to punitive damages. Compensatory and punitive damages serve distinct purposes. As the United States Supreme Court has explained:

> The former are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct. The latter, which have been described as "quasi-criminal," operate as "private fines" intended to punish the defendant and to deter future wrongdoing. A jury's assessment of the extent of a plaintiff's injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation.

Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001) (citations omitted).

Because a finding of entitlement to punitive damages is not dependent on a finding that a plaintiff suffered a specific injury, an award of compensatory damages need not precede a determination of entitlement to punitive damages. There-

fore, we conclude that the order of these determinations is not critical. See Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 474 (5th Cir.1986).

A different majority of the Court **(Wells, Anstead, Pariente, and Bell)** concludes that under our decision in Ault v. Lohr, 538 So.2d 454, 456 (Fla.1989), a finding of liability is required before entitlement to punitive damages can be determined, and that liability is more than a breach of duty. A finding of liability necessarily precedes a determination of damages, but does not compel a compensatory award. For example, in Ault, the jury found that the defendant had committed an assault and battery but awarded $0 in compensatory damages and $5000 in punitive damages. See id. at 455. Thus, unlike the Phase I jury in this case, the jury in Ault found that the plaintiff had proved the underlying cause of action but did not suffer any compensable damage.

Although we appeared to use "breach of duty" and "liability" interchangeably in Ault, the Court expressly adopted the principles set forth in dicta in Lassiter v. International Union of Operating Engineers, 349 So.2d 622 (Fla.1976). Specifically, we stated that

> [n]ominal damages are awarded to vindicate an invasion of one's legal rights where, although no physical or financial injury has been inflicted, the underlying cause of action has been proved to the satisfaction of a jury. Accordingly, the establishment of liability for a breach of duty will support an otherwise valid punitive damage award even in the absence of financial loss for which compensatory damages would be appropriate.

Ault, 538 So.2d at 455 (some emphasis supplied) (quoting Lassiter, 349 So.2d at 625-26).

In this case, the Phase I verdict did not constitute a "finding of liability" under Ault. This is evidenced by the fact that had the jury found for Tobacco on the legal cause

and reliance issues during Phase II, there would have been no opportunity for the jury to award the named plaintiffs damages of any type. In other words, Phase II findings for Tobacco on legal causation and reliance would have precluded the jury from awarding compensatory or punitive damages. It was error for the trial court to allow the jury to consider entitlement to punitive damages before the jury found that the plaintiffs had established causation and reliance.

In Phase I, the jury decided issues related to Tobacco's conduct but did not consider whether any class members relied on Tobacco's misrepresentations or were injured by Tobacco's conduct. As the Third District noted, the Phase I jury "did not determine whether the defendants were liable to anyone." Engle II, 853 So.2d at 450. It was therefore error for the Phase I jury to consider whether Tobacco was liable for punitive damages.

B. Excessiveness

Even if it were not error to determine entitlement to punitive damages in Phase I, it was clear error to allow the jury to go beyond mere entitlement and award classwide punitive damages when total compensatory damages had not been determined. Under Florida law, a trial court's determination of whether a damage award is excessive, requiring a remittitur or a new trial, is reviewed by an appellate court under an abuse of discretion standard. See St. John v. Coisman, 799 So.2d 1110, 1114 (Fla. 5th DCA 2001). However, a trial court's determination as to whether a punitive damage award exceeds the boundaries of due process as guaranteed by the Unites States Constitution is reviewed by a court under a de novo standard. See Cooper Indus., 532 U.S. at 436, 121 S.Ct. 1678.

Florida law requires that an appellate court review a punitive damages award to make certain that the manifest weight of the evidence does not render the amount of punitive damages assessed out of all reasonable proportion to the

malice, outrage, or wantonness of the tortious conduct. See Arab Termite & Pest Control of Fla., Inc. v. Jenkins, 409 So.2d 1039, 1043 (Fla.1982). Additionally, an award must be reviewed to ensure that it bears some relationship to the defendant's ability to pay and does not result in economic castigation or bankruptcy of the defendant. See Bould v. Touchette, 349 So.2d 1181, 1186 (Fla.1977).

In the past, we have not discussed whether punitive damages awards must bear some reasonable relation to compensatory damages. See Lassiter v. Int'l Union of Operating Eng'rs, 349 So.2d 622, 626 (Fla.1977); see also Ault, 538 So.2d at 456; Bankers Multiple Line Ins. Co. v. Farish, 464 So.2d 530, 533 (Fla.1985); Arab Termite, 409 So.2d at 1043. For example in Arab Termite, we stated that punitive damages "are to be measured by the enormity of the offense, entirely aside from the measure of compensation for the injured plaintiff." 409 So.2d at 1043. However, we now hold, consistent with United States Supreme Court decisions after Ault that recognize due process limits on punitive damages, that a review of the punitive damages award includes an evaluation of the punitive and compensatory amounts awarded to ensure a reasonable relationship between the two.

The United States Supreme Court has stated that a review of a punitive damages award must include consideration of three guideposts to determine whether the award is unconstitutionally excessive:

> (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

State Farm Mutual Auto. Ins.Co. v. Campbell, 538 U.S. 408, 418, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003) (citing BMW

of North America, Inc. v. Gore, 517 U.S. 559, 575, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996)).

The second guidepost is determinative in this case. As the United States Supreme Court has explained regarding this second factor:

> [W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. Gore, 517 U.S., at 582, 116 S.Ct. 1589 ("[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award"); TXO [Production Corp. v. Alliance Resources Corp., 509 U.S.] at 458[, 113 S.Ct. 2711]. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. In [Pacific Mutual Life Insurance Co. v.] Haslip, in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. 499 U.S., at 23-24[, 111 S.Ct. 1032]. We cited that 4-to-1 ratio again in Gore. 517 U.S., at 581[, 116 S.Ct. 1589]. The Court further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish. Id., at 581, and n. 33[, 116 S.Ct. 1589]. While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process,

> while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1, id., at 582[, 116 S.Ct. 1589], or, in this case, of 145 to 1.
>
> Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where "a particularly egregious act has resulted in only a small amount of economic damages." Ibid.; see also ibid. (positing that a higher ratio might be necessary where "the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine"). The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.
>
> In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.

Campbell, 538 U.S. at 424-26, 123 S.Ct. 1513. Thus, the amount of compensatory damages must be determined in advance of a determination of the amount of punitive damages awardable, if any, so that the relationship between the two may be reviewed for reasonableness.

In this case, the district court stated that without having total compensatory damages determined it would be "impossible to determine whether punitive damages bear a 'reasonable' relationship to the actual harm inflicted on the plaintiff." Engle II, 853 So.2d at 451. We agree. The trial plan

allowed a lump sum determination of punitive damages for the entire class when compensatory damages had been determined only for the three individual class representatives. This approach does not provide a reviewing court with an adequate starting point to compare the lump sum punitive damages amount to compensatory damages to ensure there is some reasonable relationship. Accordingly, even if there was no error in allowing the Phase I jury to find entitlement to punitive damages, the classwide punitive damages award must be reversed.[8]

3. Law of the Case-Class Certification

In concluding that the Engle Class must be decertified, the Third District in Engle II ruled that the "'predominance' or 'commonality' requirement is not satisfied, where claims involve factual determinations unique to each plaintiff." 853 So.2d at 445. The district court explained that "common questions" did not predominate over individual issues because the choice of law analysis would require examination of numerous different state laws governing different individual claims. See id. at 449. The court also concluded that class representation would not be "superior" to individual suits because: (1) individualized issues of liability, affirmative defenses, and damages outweighed any common issues in the case; (2) each class member had unique and different experiences, which would necessitate litigation of substantially separate issues, including legal causation, specific medical causation, reliance, and awareness of risks; and (3)

[8] We also conclude that the punitive damages award was clearly excessive under the limitation based on ability to pay established by our precedent because it is "so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate." Lassiter, 349 So.2d at 627. A comparison of the amounts awarded and the financial worth assigned to each company by the Engle Class's expert clearly demonstrates that the award would result in an unlawful crippling of the defendant companies.

individualized choice of law issues would cause class proceedings to be unmanageable. See id. at 445-47.

We conclude that the Third District erred in nullifying its previous affirmance of the trial court's certification order. Contrary to the Third District's conclusion, Florida Rule of Civil Procedure 1.220(d)(1) did not authorize the subsequent (and different) panel of appellate judges to simply substitute its judgment for that of the prior panel and reverse the trial court's certification order after the trial court entered its final judgment after Phase II. See Engle II, 853 So.2d at 443 n.4.

A class is normally certified at an early stage of the proceedings, certainly before trial, and typically before discovery is completed. Rule 1.220(d)(1) provides an avenue for reexamining certification if subsequent discovery shows that circumstances have changed. See Int'l Longshoremen's Ass'n, Deep Sea Local 1408 v. Fisher, 860 So.2d 1078, 1078 (Fla. 1st DCA 2003) (affirming the trial court's nonfinal order certifying a class but noting that "because the order is interlocutory, it may be revisited by the trial court should circumstances change"). Rule 1.220(d)(1) was not designed to allow a district court to decertify a class, contrary to its previous affirmance of class certification and after notice to thousands of Floridians, a two-year trial, and an entry of final judgment.

Moreover, under the doctrine of law of the case, the Third District would have been justified in reversing its previous ruling in Engle I only if it concluded that the prior ruling would have resulted in a clear manifest injustice. See Juliano, 801 So.2d at 106 ("[A]n appellate court has the power to reconsider and correct an erroneous ruling that has become the law of the case where a prior ruling would result in a 'manifest injustice.'") (quoting Strazzulla v. Hendrick, 177 So.2d 1, 4 (Fla.1965)).

Law of the case "requires that questions of law actually decided on appeal must govern the case in the same court and

the trial court, through all subsequent stages of the proceedings." Juliano, 801 So.2d at 105. The Third District recently reiterated the purpose of the law of the case doctrine in a decision holding that the doctrine precluded relitigation of the propriety of class action treatment: "[P]oints of law adjudicated in a prior appeal are binding in order to promote stability of judicial decisions and to avoid piecemeal litigation." State, Dep't of Revenue v. Bridger, 935 So.2d 536, 538, 539 (Fla. 3d DCA 2006) (quoting Bueno v. Bueno de Khawly, 677 So.2d 3, 4 (Fla. 3d DCA 1996)).

The law of the case applies in subsequent proceedings as long as there has been no change in the facts on which the mandate was based. Specifically, we have recognized that

> an appellate court should reconsider a point of law previously decided on a former appeal only as a matter of grace, and not as a matter of right; and that an exception to the general rule binding the parties to "the law of the case" at the retrial and at all subsequent proceedings should not be made except in unusual circumstances and for the most cogent reasons-and always, of course, only where "manifest injustice" will result from a strict and rigid adherence to the rule.

Strazzulla v. Hendrick, 177 So.2d 1, 4 (Fla. 1965). We have also cautioned that "the exception to the rule should never be allowed when it would amount to nothing more than a second appeal on a question determined on the first appeal." Id. (emphasis supplied).

We conclude that no circumstances existed that justified the subsequent panel's reconsideration of the prior Third District decision approving class certification, which all parties and the trial court relied on to govern the continuation of the class action. On this issue, the analysis of the Engle II court was flawed in several respects. First, the Engle II court ignored the trial court's pretrial ruling that only Florida law

would apply when it stated that the "choice-of-law analysis in the present case will require examination of numerous significantly different state laws governing the different plaintiffs' claims." Engle II, 853 So.2d at 449. Second, none of the cases from other jurisdictions cited by the Third District in Engle II to justify decertification was in the procedural posture of the present case.[9]

This case came before the Third District in Engle II after it had affirmed the class certification and after the conclusion of a trial on all common issues. Thus, there is no need to engage in an abstract analysis of the propriety of separate proceedings on common limited liability issues. Invalidating the completed class action proceedings on manageability and su-

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[9] See, e.g., Barnes v. American Tobacco Co., 161 F.3d 127 (3d Cir.1998) (affirming district court's decertification); Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir.1996) (reversing class certification on interlocutory appeal); Estate of Mahoney v. R.J. Reynolds Tobacco Co., 204 F.R.D. 150 (S.D. Iowa 2001) (denying motion to certify class action); Badillo v. American Tobacco Co., 202 F.R.D. 261 (D. Nev. 2001) (denying motions to certify class action); Guillory v. American Tobacco Co., No. 97 C 8641, 2001 WL 290603 (N.D. Ill. Mar. 20, 2001) (denying motion to certify class action); Aksamit v. Brown & Williamson Tobacco Corp., No. C.A. 6:97-3636-24, 2001 WL 1809378 at *9 (D.S.C. Dec. 29, 2000) (denying a motion to certify class action); Thompson v. American Tobacco Co., Inc., 189 F.R.D. 544 (D. Minn.1999) (denying motion to certify class action); Insolia v. Philip Morris Inc., 186 F.R.D. 535, 546 (W.D. Wis. 1998) (denying motion to certify class action); Emig v. American Tobacco Co., 184 F.R.D. 379, 389 (D. Kan.1998) (denying motion to certify class action); Barreras Ruiz v. American Tobacco Co., 180 F.R.D. 194, 197 (D.P.R. 1998) (denying motion to certify class action); Smith v. Brown & Williamson Tobacco Corp., 174 F.R.D. 90, 94 (W.D.Mo.1997) (denying motion to certify class action); Philip Morris, Inc. v. Angeletti, 358 Md. 689, 752 A.2d 200 (2000) (reversing trial court's class certification after trial plan had been established but before trial commenced).

periority grounds after a trial has occurred does not accord with common sense or logic.

Of course, this Court is not bound by the Third District's law of the case. See Juliano, 801 So.2d at 105 ("The doctrine of the law of the case requires that questions of law actually decided on appeal must govern the case in the same court and the trial court, through all subsequent stages of the proceedings."). Nevertheless, we conclude that the trial court did not abuse its discretion in certifying the class. See Fla. Dep't of Agric. & Consumer Servs. v. City of Pompano Beach, 829 So.2d 928, 929 (Fla. 4th DCA 2002) ("The trial court's order certifying the class is subject to review under an abuse of discretion standard."); Bouchard Transp. Co. v. Updegraff, 807 So.2d 768, 771 (Fla. 2d DCA 2002) ("[T]he determination that a case meets the requirements of a class action is a factual finding that is within the trial court's discretion and will be reversed on appeal only if an abuse of discretion is shown.").

4. Three-Phase Trial Plan—Decertification

We agree with the Third District that problems with the three-phase trial plan negate the continued viability of this class action. We conclude that continued class action treatment for Phase III of the trial plan is not feasible because individualized issues such as legal causation, comparative fault, and damages predominate. See Fla. R. Civ. P. 1.220(b)(3) ("A claim or defense may be maintained on behalf of a class if the court concludes that the prerequisites of subdivision (a) are satisfied, and that ... the claim or defense is not maintainable under either subdivision (b)(1) or (b)(2), but the questions of law or fact common to the claim or defense of the representative party and the claim or defense of each member of the class predominate over any question of law or fact affecting only individual members of the class . . . .").

Florida Rule of Civil Procedure 1.220(d)(4)(A) provides that "[w]hen appropriate ... a claim or defense may be brought or maintained on behalf of a class concerning particular issues." Although no Florida cases address whether it is appropriate under rule 1.220(d)(4)(A) to certify class treatment for only limited liability issues, several decisions by federal appellate courts applying a similar provision in the Federal Rules of Civil Procedure provide persuasive authority for this approach.

Federal Rule of Civil Procedure 23(c)(4)(A) provides that "[w]hen appropriate ... an action may be brought or maintained as a class action with respect to particular issues." In determining whether the predominance requirement of Federal Rule of Civil Procedure 23(b)(3)[10] has been met, several United States Courts of Appeals have concluded that under federal rule 23(c)(4)(A) a trial court can properly separate liability and damages issues, certifying class treatment of liability while leaving damages to be determined on an individual basis. See Olden v. LaFarge Corp., 383 F.3d 495, 509 (6th Cir.2004) (stating that the district court can properly "bifurcate the issue of liability from the issue of damages, and if liability is found, the issue of damages can de decided by a special master or by another method"); Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir.2004) (noting that "Rule 23 allows district courts to devise imaginative solutions to problems created by the presence in a class action litigation of individual damages issues"); In re Visa Check/MasterMoney Antitrust Litigation, 280 F.3d 124, 139-41 (2d Cir.2001) (noting that "[c]ommon issues may predominate when liability can be determined on a class-wide

[10] Federal rule 23(b)(3) is similar to Florida rule 1.220(b)(3) and provides in pertinent part that "[a]n action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition ... the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members."

basis, even when there are some individualized damage issues" and that "[t]here are a number of management tools available to a district court to address any individualized damages issues that might arise in a class action"); Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir.1996) ("Even if the common questions do not predominate over the individual questions so that class certification of the entire action is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of these particular issues."); see also Slaven v. BP America, Inc., 190 F.R.D. 649, 658 (C.D. Cal. 2000) (maintaining class status "solely for the determination of liability" and stating that "[i]f plaintiffs prevail on the liability portion of their case, the Court will determine the appropriate method of adjudicating causation and damages issues at that juncture").[11]

The Second and Seventh Circuits have also stated that the determination that class treatment of damages issues is inappropriate can be made after a finding on liability. See Carnegie, 376 F.3d at 661 (explaining that one option available to the district courts for solving problems created by the presence in a class action litigation of individual damages is-

[11] But see Castano v. American Tobacco Co., 84 F.3d 734, 745 n.21 (5th Cir.1996) (concluding that the interaction of (b)(3) and (c)(4) requires that "a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial"). Both the Second and Fourth Circuits have noted the conflict on this issue. See Gunnells v. Healthplan Services, Inc., 348 F.3d 417, 444 (4th Cir.2003) ("[T]here is a circuit conflict as to whether predominance must be shown with respect to an entire cause of action, or merely with respect to a specific issue, in order to invoke (c)(4)."); Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 167 n.12 (2d Cir.2001) (noting that "an alternate understanding of the interaction of (b)(3) and (c)(4) to that set forth in Castano has been advanced elsewhere").

sues is to decertify the class after the liability trial); Visa Check/MasterMoney Antitrust Litigation, 280 F.3d at 141 (same). In Carnegie, the Seventh Circuit discussed the manageability of a class action alleging RICO violations and explained:

> Often . . . there is a big difference from the standpoint of manageability between the liability and remedy phases of a class action. The number of class members need have no bearing on the burdensomeness of litigating a violation of RICO. Whether particular members of the class were defrauded and if so what their damages were are another matter, and it may be that if and when the defendants are determined to have violated the law separate proceedings of some character will be required to determine the entitlements of the individual class members to relief. That prospect need not defeat class treatment of the question whether the defendants violated RICO. Once that question is answered, if it is answered in favor of the class, a global settlement . . . will be a natural and appropriate sequel. And if there is no settlement, that won't be the end of the world. Rule 23 allows district courts to devise imaginative solutions to problems created by the presence in a class action litigation of individual damages issues.

376 F.3d at 661 (citations omitted). In Visa Check/MasterMoney Antitrust Litigation, the Second Circuit concluded that the district court adequately addressed individual issues that might arise from certifying the class by specifically recognizing "its ability to modify its class certification order, sever liability and damages, or even decertify the class if such an action ultimately became necessary." 280 F.3d at 141.

In this case, the Phase I trial has been completed. The pragmatic solution is to now decertify the class, retaining the

jury's Phase I findings other than those on the fraud and intentional infliction of emotion distress claims, which involved highly individualized determinations, and the finding on entitlement to punitive damages questions, which was premature. Class members can choose to initiate individual damages actions and the Phase I common core findings we approved above will have res judicata effect in those trials. See Daenzer v. Wayland Ford, Inc., 210 F.R.D. 202, 205 (W.D. Mich. 2002) (entering summary judgment on the issue of liability, decertifying the class on the issue of damages and stating that "[t]he Court's decision as to liability is res judicata in any damages action individual class members decide to bring"); McCormack v. Abbott Labs., 617 F.Supp. 1521 (D. Mass. 1985) (concluding that plaintiff's strict liability claim was barred by judgment for the defendants entered in a prior class action, which the plaintiff joined, before that class action was decertified).[12]

We disagree with Justice Wells' conclusion that bifurcating the trial in this manner violates article I, section 22 of the Florida Constitution. See concurring in part and dissenting in part op. at 1285-87. We recognize the concerns expressed by the Fifth Circuit Court of Appeals in Castano v. American Tobacco Co., 84 F.3d 734, 750 (5th Cir.1996), in which that court held that bifurcation of issues in a nationwide smoking class action violated the Seventh Amendment to the United

[12] Justice Wells asserts that allowing limited Phase I findings to stand sets "harmful and confusing precedent." Concurring in part and dissenting in part op. at 1284. However, the procedural posture of this case is unique and unlikely to be repeated. Further, many of the questions posed by Justice Wells are answered in this opinion. As we state in both the opening and closing of the opinion, class members (i.e. those individuals who fit the class description as of the November 21, 1996, cut-off date) must file individual actions against the defendants within one year of the issuance of this Court's mandate to benefit from the Phase I finding we uphold herein.

States Constitution.[13] However, subsequent to its decision in Castano, the Fifth Circuit held that the risk of infringing on the parties' Seventh Amendment rights is not significant and is in fact avoided where the liability issues common to all class members are tried together by a single initial jury, and issues affecting individual class members such as causation, damages, and comparative negligence are tried by different juries. See Mullen v. Treasure Chest Casino, LLC, 186 F.3d 620, 628-29 (5th Cir.1999). Recognizing that it had previously reached a different conclusion in Castano, the Fifth Circuit explained that the circumstances of Castano were distinct from those present in Mullen:

> In Castano, we were concerned that allowing a second jury to consider the plaintiffs' comparative negligence would invite that jury to reconsider the first jury's findings concerning the defendants' conduct. We believe that such a risk has been avoided here by leaving all issues of causation for the phase-two jury. When a jury considers the comparative negligence of a plaintiff, "the focus is upon causation. It is inevitable that a comparison of the conduct of plaintiffs and defendants ultimately be in terms of causation." Lewis v. Timco, Inc., 716 F.2d 1425, 1431 (5th Cir.1983) (en banc); see id. (permitting the use of comparative negligence in strict liability claims). Thus, in considering comparative negligence, the phase two jury would not be reconsidering the first jury's findings of whether Treasure Chest's conduct was negligent or the [vessel] unseaworthy, but only the degree to which those con-

[13] When this Court has interpreted article I, section 22 of the Florida Constitution, it found guidance in the Seventh Amendment of the United States Constitution while recognizing that the Seventh Amendment does not apply to actions brought in state court. See Dep't of Revenue v. The Printing House, 644 So.2d 498, 500 (Fla. 1994).

> ditions were the sole or contributing cause of the class member's injury. Because the first jury will not be considering any issues of causation, no Seventh Amendment implications affect our review of the district court's superiority finding.

Mullen, 186 F.3d at 628-29 (emphasis supplied).

The Fifth Circuit's reasoning in Mullen is persuasive. In this case, although the jury decided issues common to all class members, none involved whether, or the degree to which, the defendants' conduct was the sole or contributing cause of the class members' injuries, which is the pertinent question in applying the doctrine of comparative negligence. We thus follow the reasoning of Mullen and conclude that the trial plan in this case did not violate Tobacco's rights under article I, section 22 of the Florida Constitution.

5. Arguments of Engle Class's Counsel

We conclude that, under the totality of the circumstances, reversal is not warranted based on the remarks made by the Engle Class's counsel, Stanley Rosenblatt. Nevertheless, we must again remind counsel that we will not condone improper arguments. Inappropriate jury arguments in this type of case risk wasting significant judicial resources. Here, trial counsel ventured very close to the line of reversible error on a number of occasions in his attempt to counteract opposing counsel's contentions that Tobacco acted lawfully and to communicate his message to the jury that "legal doesn't make it right." However, we conclude that under the totality of the circumstances these comments did not rise to the level of reversible error.

If the issue of an opponent's improper argument has been properly preserved by objection and motion for mistrial, the trial court should grant a new trial if the argument was "so highly prejudicial and inflammatory that it denied the opposing party its right to a fair trial." Tanner v. Beck, 907 So.2d 1190, 1196 (Fla. 3d DCA 2005); see also Murphy v.

Int'l Robotic Sys., Inc., 766 So.2d 1010, 1013 n.2 (Fla. 2000) (stating the Court's decision addressing unobjected-to argument "does not impact the legal standards applicable to consideration of the issue that has been properly preserved by objection and motion for mistrial, which remains whether the comment was highly prejudicial and inflammatory"). To justify granting a motion for a new trial based on unobjected-to improper argument, the trial court must find that the improper argument is of such a nature as to reach into the validity of the trial itself to the extent that the verdict could not have been obtained but for such comments. See Murphy, 766 So.2d at 1029-30. A trial court's order granting or denying a motion for a new trial based on either objected-to or unobjected-to improper argument is reviewed for abuse of discretion. See id. at 1030-31 ("[T]he appellate court must . . . apply an abuse of discretion standard in reviewing either the trial court's grant or denial of a new trial based on the unobjected-to closing argument."); Bocher v. Glass, 874 So.2d 701, 704 (Fla. 1st DCA 2004) (reviewing a trial court's order denying a motion for rehearing based on objected-to improper argument for an abuse of discretion).

In denying Tobacco's motions for mistrial, the trial court stated:

> The Court has carefully considered the Motions for Mistrial in this cause and has determined that curative instructions to the jury and/or motions to strike have been granted as requested by the movant, for most of the motions, and in any event the cumulative effect of the alleged error, was not in the opinion of the Court, sufficient to have so influenced the jury as to affect the outcome of the case considering the length of the trial, the number of witnesses presented, the quality and quantity of the testimony, the huge amount of documentary evidence, and specifically the substance of the alleged remarks. The jury in this case rendered three verdicts, each based upon

> a mountain of evidence over a period of two years in three separate trials. The court feels confident, that although some remarks of counsel may have been uncalled for, or subject to objection, they were not so egregious as to require a new trial.

Engle F.J., No. 94-08273 CA-22 order at 17. However, the Third District held that the comments "caused irreparable prejudice and require reversal." Engle II, 853 So.2d at 458. Specifically, the district court determined that this was accomplished in two stages:

> First, by inflaming the jury with racial pandering and pleas for nullification of the law to secure entitlement to punitive damages. And second, by removing responsibility from the jury for the size of the award, through arguing the award would be subject to appellate review and that it would not be paid out in a lump sum, but rather through a payout scheme.

Id. at 459. The district court then proceeded to list all of counsel's arguments it determined were improper.

Significantly, the manner in which the district court has set forth and presented the offending argument, stringing the comments together, would certainly cause a reader to assume that the comments are prejudicial. However, this is not proper analysis for review under the totality of the circumstances. Context is crucial. To determine whether the challenged statements and arguments were in fact prejudicial, the statements cannot be evaluated in isolation but must be placed and evaluated in context. See State v. Jones, 867 So.2d 398, 400 (Fla.2004) ("[T]his Court has evaluated the prosecutor's action in context rather than focusing on the challenged statement in isolation.").

We emphasize that the duration of this trial does not mean that a comment or several comments standing alone would not warrant reversal. Nonetheless, the length of the

trial is relevant to the analysis because the alleged improper statements were not made on the same day or contained within a two- or three-hour closing argument. These statements spanned a two-year period. Some comments were made during opening statements in Phase I (liability phase) in October of 1998, some during Phase I closing argument in June of 1999, and others during the closing statements in Phase II-B (punitive damages phase) in July of 2000. Many of the alleged improper comments did not even prompt an objection by Tobacco.[14]

We begin with the Third District's conclusion that plaintiffs' counsel engaged in "racial pandering" and that the jury's "runaway" verdict was evidently one inflamed by passion and prejudice. A single reference to "race" in the Phase I opening statement was in the context of the consumer studies that the defendants conducted that divide American consumers into groups. Mr. Rosenblatt's comment that "they study races" was part of a statement about the study of the American consumer: "They study kids; they study races; they divide the American consumer into groups to sell their product." In fact, when the defense objected on the basis that those comments were "only designed to prejudice the jury," the trial court rejected this argument because that was "not the context of which it's being used." Mr. Rosenblatt then followed up with the statement that this is an industry that "divides the American consumer into groups: white, black,

[14] This Court has recognized:

> Harmfulness in this context also carries a requirement that the comments be so highly prejudicial and of such collective impact as to gravely impair a fair consideration and determination of the case by the jury. Passing remarks of little consequence in the scope of a lengthy trial should find little sympathy if no contemporaneous objection is voiced. The extensiveness of the objectionable material is a factor to be considered in the harmfulness analysis.

Murphy, 766 So.2d at 1029-30.

Jewish, Christian, young, old." The trial court did not abuse its discretion by determining that these statements were made in an attempt to show how Tobacco sells its products and advertises to different groups, not to impermissibly prejudice the jury.

As to the Phase I closing argument, we agree that a series of improper remarks occurred when counsel injected race into his argument:

> Are there two sides to every question? And the immediate gut reaction is: Yeah, yeah. You want to be fair and you say: Right, there's two sides to every question. What's the other side to the Holocaust? What is the other side to slavery?

An objection was made and sustained. While one could posit that this was merely an attempt to explain to the jury that there are not always two sides, several minutes later Mr. Rosenblatt returned to a race-based theme by referring to Rosa Parks:

> Let's discuss the concept of legal in the context of America. I noticed in last week's newspaper, Rosa Parks, who is 86 years old, got the Congressional Gold Medal because in 1955 . . . .

Mr. Rosenblatt got no further because an objection was made and sustained. Undaunted by the trial court's ruling, Mr. Rosenblatt continued:

> We look back in history. We look back in history. The whole civil rights movement of the '60s was fighting against unjust laws. Dr. King was arrested in the '60s . . . .

An objection was made and overruled and Mr. Rosenblatt continued:

> In this building, in this building, a temple to the law, they were—there were drinking fountains which said Whites Only.

Once again, an objection was made and overruled.

There is absolutely no justification for this series of remarks, which appears to compare the tobacco industry with slavery and, by invoking civil rights leaders Rosa Parks and Martin Luther King, appealed to the jury's sense of outrage for the injustices visited upon African-Americans in this country. We condemn these tactics of Mr. Rosenblatt. His attempt to incite racial passions was conduct unbecoming an attorney practicing in our state courts.

Nevertheless, we note that the trial court sustained objections to several of these remarks and no motion for mistrial was made or curative instruction requested. In addition, there was no further race-based argument during the remainder of the closing, and, significantly, no such references were made in any of Mr. Rosenblatt's Phase I rebuttal argument.

We next discuss the Third District's conclusion that Mr. Rosenblatt's Phase I closing argument was also replete with impermissible references to jury nullification. The relevant comments were made in response to Tobacco's preemption defense: that the warnings on the cigarettes were as provided by law. Although compliance with the federal warnings preempted any claim based on failure to warn, it did not eliminate the other causes of action that the jury had to consider in Phase I. As for the comment "legal don't make it right," Mr. Rosenblatt was referring to the answers given by the CEO for Brown & Williamson, Nick Brookes. Mr. Brookes was asked what he would do with his product if he became convinced that cigarettes caused cancer and heart disease. His reply was it would not affect his business because "it's a legal product." Mr. Rosenblatt's response was that "legal don't make it right." No objection was made. In fact, this theme continued in rebuttal when Mr. Rosenblatt explained without objection:

> It's a legal product. There is no question about it. But a legal product does not mean that the cigarette

> companies are not responsible when their product causes harm and death to their customers. And being legal is a very relative term.

These arguments were not an attempt to tell the jury to ignore the law.

We conclude, under the totality of the circumstances, including that several objections were sustained and a number of the arguments were unobjected-to, that the defendants did not sustain their burden of proving reversible error under Murphy or that the trial court abused its discretion in denying the motion for new trial as to Phase I. As to Phase II, we note that no arguments have been raised as to impermissible comments during Phase II-A, in which the jury determined compensatory damages as to the three class representatives. Moreover, a review of the verdicts reveals that each verdict reflected a careful and differentiated analysis as to comparative fault and individual damages and in no way justifies the Third District's overall conclusion that this was a runaway jury inflamed by race because of the arguments directed to the four of the six members of the jury who were African-American. As to Phase II-B, because we are reversing the punitive damages award we do not separately review each of these arguments except to again note that no race-based arguments were made.

6. Reversal of Final Judgments in Favor of the Three Class Representatives

The issue of whether two of the three Engle Class representatives are properly included within the class as certified by the trial court and approved on appeal involves the application of the law to a set of undisputed facts. "[W]here the facts are essentially undisputed, the legal effect of the evidence will be a question of law." Town of Palm Beach v. Palm Beach County, 460 So.2d 879, 882 (Fla. 1984). Questions of law are reviewed de novo.

The trial court originally certified this class on October 31, 1994. This order provided for notice to the members of the class by way of publication and indicated that the trial court was to hold an additional hearing "to discuss the content, timing and manner of providing notice." At that time, the class was described as:

> All United States citizens and residents, and their survivors, who have suffered, presently suffer or who have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine. The class shall specifically exclude officers, directors and agents of the [d]efendants.

Engle I, 672 So.2d at 40. The class certification was affirmed by the Third District on January 31, 1996, but the class membership was altered by the district court to include only Florida citizens and residents. See id. at 42. Subsequent to the district court's modification limiting the class to Florida citizens, the trial court issued an amended order on November 21, 1996, recertifying the more limited class.

The final class description could lead one to believe that the class is open-ended because there is no stated cut-off date for membership. However, an open-ended class would not allow for notice and an opportunity to opt out as required by rule 1.220(d)(2) and may implicate potential class members' right of access to the courts under article I, section 21 of the Florida Constitution.

Further, without the ability to opt out, potential plaintiffs could argue that they should be allowed to intervene after a judgment in favor of the class or, alternatively, that they are not bound by an adverse judgment. Cf. Katz v. Carte Blanche Corp., 496 F.2d 747, 759 (3d Cir.1974) (explaining that prior to the adoption of Federal Rule of Civil procedure 23(c)(2) some courts suggested that "it would be proper to make the class action determination and permit class members to intervene after the defendant's liability had been de-

termined in the single lawsuit," that this "one-way intervention had the effect of giving collateral estoppel effect to the judgment of liability in a case where the estoppel was not mutual," and that the notice and opt-out provisions were adopted to give mutual estoppel effect to the judgment on liability). A finite class is necessary to avoid multiple similar lawsuits and to make legal process more effective and expeditious, important goals of a class action suit. See Tenney v. City of Miami Beach, 152 Fla. 126, 11 So.2d 188, 189 (1942) ("The very purpose of a class suit is to save a multiplicity of suits, to reduce the expense of litigation, to make legal processes more effective and expeditious, and to make available a remedy that would not otherwise exist.").

The plain language of the class certification indicates that the trial court anticipated that the class would be cut off or limited to the date of final certification. The phrase "who have suffered, presently suffer or have died" supports the view that the class should include only those people who were affected in the past or who were presently suffering at the time the class was recertified by the trial court. Moreover, although not controlling, federal case law supports the interpretation that the date of final class certification should be presumed the proper cut-off date for class membership. See Sosna v. Iowa, 419 U.S. 393, 403 (1975) ("A litigant must be a member of the class which he or she seeks to represent at the time the class action is certified by the district court.") (citing Bailey v. Patterson, 369 U.S. 31 (1962)); Davis v. Ball Mem'l Hosp. Ass'n, 753 F.2d 1410, 1420 (7th Cir.1985) ("To be a proper class representative, the named plaintiff must be a member of the class at the time the class action is certified.").

In our view, it is reasonable to conclude that the cut-off date for class membership is November, 21, 1996, the date the trial court recertified the class and issued an amended order conforming the class description to the Third District's decision. It was with this November 21, 1996, order that the

circuit court first ordered that notice to potential class members be published in newspapers and magazines circulated in Florida. The language employed by the United States Supreme Court in Sosna, although not addressing a scenario such as we face today, is not contrary to our conclusion.

Relying upon Davis v. Ball Memorial Hospital Association, the district court held that "[s]ince Farnan was diagnosed in April 1996, and Della Vecchia was diagnosed in February 1997, they are clearly excluded from the class and the judgment in their favor must be reversed." Engle II, 853 So.2d at 454 n. 23 (emphasis supplied). However, "diagnosis" as a qualifying factor does not appear anywhere in the description of the class certified. Rather, the class is described as those "who have suffered, presently suffer or have died from diseases and medical conditions." Engle I, 672 So.2d at 40 (emphasis supplied). The critical event is not when an illness was actually diagnosed by a physician, but when the disease or condition first manifested itself.

Our review of the medical records demonstrates that class representative Farnan was formally diagnosed with lung cancer in March of 1996, clearly demonstrating her disease had manifested by that time. Therefore, she was a proper member of the class at the time of the circuit court's November 21, 1996, order. As for class representative Della Vecchia, it was noted by her doctors in early 1997 that she had a past medical history of "COPD" and significant hypertension. Thus, Della Vecchia's medical records indicate that she had been suffering from a tobacco-related disease prior to the time of certification and is also properly included as a class member. We therefore quash the district court's reversal of judgment entered in favor of class representatives Farnan and Della Vecchia and hereby order that the judgments be reinstated.

In addition to reversing the judgments in favor of Farnan and Della Vecchia, the district court also held that the judgment in favor of Tobacco should have been entered as to all

of class representative Amodeo's claims. See Engle II, 853 So.2d at 455 n.23. We agree that the district court properly held that all judgments in favor of class representative Amodeo were barred by the applicable statute of limitations.

6. [sic] Final Judgments Entered in Favor of the Three Class Representatives in Favor of Liggett and Brooke

As noted above, the final judgments entered in favor of class representative Amodeo, including those against Liggett and Brooke, must be reversed because Amodeo's claims are barred by the statute of limitations. We also agree with the Third District that the judgments against defendants Liggett and Brooke in favor of Farnan and Del Vecchia must be reversed because there was insufficient evidence to support these judgments. As the Third District explained, "it is undisputed that the Liggett defendants did not manufacture or sell any of the products that allegedly caused injury to the individual plaintiff representatives. It is also undisputed that the jury found the Liggett defendants zero percent at fault with respect to each of the named plaintiffs." Engle II, 853 So.2d at 466 n. 46. A defendant who is found to be zero percent at fault for a plaintiff's damages cannot be held jointly and severally liable for those damages. We agree with the Third District that this inconsistency in the verdict requires reversal of the judgments entered against Liggett and Brooke. See id.

CONCLUSION

In conclusion, we approve the Third District's holding that the $145 billion award of punitive damages must be vacated. However, we disapprove the Third District's conclusion that the class action punitive damages claims were barred by the FSA.

We also disapprove the Third District's holding that the trial court abused its discretion in denying Tobacco's motion for a mistrial due to improper argument by the Engle Class's counsel. We uphold the award of compensatory damages as

to plaintiffs Farnan and Della Vecchia, and approve the reversal of the entry of judgment in favor of Amodeo. However, the judgments against defendants Liggett and Brooke must reversed.

We approve the Phase I findings for the class as to Questions 1 (that smoking cigarettes causes aortic aneurysm, bladder cancer, cerebrovascular disease, cervical cancer, chronic obstructive pulmonary disease, coronary heart disease, esophageal cancer, kidney cancer, laryngeal cancer, lung cancer (specifically, adenocarinoma, large cell carcinoma, small cell carcinoma, and squamous cell carcinoma), complications of pregnancy, oral cavity/tongue cancer, pancreatic cancer, peripheral vascular disease, pharyngeal cancer, and stomach cancer), 2 (that nicotine in cigarettes is addictive), 3 (that the defendants placed cigarettes on the market that were defective and unreasonably dangerous), 4(a) (that the defendants concealed or omitted material information not otherwise known or available knowing that the material was false or misleading or failed to disclose a material fact concerning the health effects or addictive nature of smoking cigarettes or both), 5(a) (that the defendants agreed to conceal or omit information regarding the health effects of cigarettes or their addictive nature with the intention that smokers and the public would rely on this information to their detriment), 6 (that all of the defendants sold or supplied cigarettes that were defective), (7) (that all of the defendants sold or supplied cigarettes that, at the time of sale or supply, did not conform to representations of fact made by said defendants), and 8 (that all of the defendants were negligent). Therefore, these findings in favor of the Engle Class can stand.

The class consists of all Florida residents fitting the class description as of the trial court's order dated November 21, 1996. However, we conclude for the reasons explained in this opinion that continued class action treatment is not feasible and that upon remand the class must be decertified. Indi-

vidual plaintiffs within the class will be permitted to proceed individually with the findings set forth above given res judicata effect in any subsequent trial between individual class members and the defendants, provided such action is filed within one year of the mandate in this case. We remand this case to the Third District for further proceedings consistent with this opinion.

It is so ordered.

ANSTEAD and PARIENTE, JJ., concur.

LEWIS, C.J., concurs in part and dissents in part with an opinion, in which QUINCE, J., concurs.

WELLS, J., concurs in part and dissents in part with an opinion, in which BELL, J., concurs.

CANTERO, J., recused.

LEWIS, C.J., concurring in part and dissenting in part.

I concur in the majority's opinion and most of the reasoning employed therein. However, I cannot agree with the majority's analysis and conclusion with regard to entitlement to punitive damages. For the reasons that follow, in my view Florida law clearly requires that the jury's determination of entitlement to punitive damages which resulted in Phase I must stand.

PHASE I FINDINGS ON ENTITLEMENT TO PUNITIVE DAMAGES

Although I do agree with the majority's conclusion that the Third District misapplied our decision in Ault v. Lohr, 538 So.2d 454, 456 (Fla.1989), in holding that compensatory damages must be determined before a jury can consider entitlement to punitive damages, I cannot agree with the majority's view that the trial court erred in allowing the jury to consider the entitlement of the class to punitive damages during Phase I of the trial based on the majority's conclusion

that proof of liability, which includes both reliance and causation, is a missing predicate here to the determination of entitlement to punitive damages. For the reasons that follow, I would allow the jury's determination of punitive conduct and of entitlement to punitive damages to stand for the class to be later applied as the case proceeds.

This Court has previously addressed "whether a plaintiff can recover punitive damages where the factfinder has found a breach of duty but no compensatory or actual damages have been proven." Ault v. Lohr, 538 So.2d 454, 456 (Fla.1989). In Ault, we clearly recognized that "an express finding of a breach of duty should be the critical factor in an award of punitive damages." Id. Further, this Court has held that "a finding of liability alone will support an award of punitive damages 'even in the absence of financial loss for which compensatory damages would be appropriate.'" Id. (quoting Lassitter v. Int'l Union of Operating Eng'rs, 349 So.2d 622, 626 (Fla.1977)); see also Mortellite v. Am. Tower, L.P., 819 So.2d 928, 935 (Fla. 2d DCA 2002) (concluding that, based on the trial court's finding of breach of duty, the appellant was ultimately entitled to a punitive damage award even if, after remand, it was again determined that he was not entitled to compensatory damages); Horizon Leasing v. Leefmans, 568 So.2d 73, 75 (Fla. 4th DCA 1990) ("[A] plaintiff can recover punitive damages where the fact finder has found a breach of duty but no compensatory or actual damages have been proven.").

In this matter, Tobacco asserts, and the majority agrees, that the jury in Phase I only determined that Tobacco breached its duty and that a breach of duty does not constitute "a finding of liability" under Ault. Contrary to this assertion, the Phase I jury in the present case found Tobacco responsible with regard to the common core issues pertaining to liability and general causation. This is supported by the fact that the trial plan only allowed the jury to proceed to the next stage of Phase I-a determination of entitlement to puni-

tive damages-if liability was found. The final judgment awarding compensatory damages to the three class representatives and punitive damages to the entire class was only possible after liability was determined because a judgment for damages could not be entered if there had been no finding of liability. See Oliveira v. Ilion Taxi Aero LTDA, 830 So.2d 241, 242 (Fla. 4th DCA 2002) (recognizing "as does Ault, that as a matter of law a judgment for damages cannot be entered where there is no finding of liability"); Cont'l Assurance Co. v. Davis, 538 So.2d 542, 544 (Fla. 1st DCA 1989) (concluding that "absent the jury's finding of liability on the underlying fraud issue, there can be no valid award of punitive damages," citing Ault); Cloutier v. Cent. Contracting, Inc., 418 So.2d 1233, 1234 (Fla. 5th DCA 1982) (concluding that a verdict finding damages without finding liability cannot support the damage award). Pursuant to Ault, the jury's finding of liability and responsibility with regard to the common core issues alone in Phase I could support the jury's determination that the class was entitled to punitive damages, notwithstanding that compensatory damages have not yet been awarded to all class members. In fact, a final judgment awarding punitive damages has been affirmed notwithstanding that the judgment awarded no compensatory damages. See Russin v. Richard F. Greminger, P.A., 563 So.2d 1089 (Fla. 4th DCA 1990) (citing Ault). A finding of liability, not compensatory damages, is the sine qua non of entitlement to a punitive damage award.

In support of its argument that compensatory damages are a prerequisite for awarding punitive damages, Tobacco relies, as did the subsequent panel in Engle II, on only a concurring opinion in Ault, in which it was stated:

> The crucial element in determining whether punitive damages may be awarded absent an award of compensatory damages is proof of the underlying cause of action. Where actual damage is an essential element of the underlying cause of action, an

> award of compensatory damages must be a prerequisite to an award of punitive damages. This case involved the torts of assault and battery, which do not require proof of actual damage.

853 So.2d at 457 (Ehrlich, C.J., concurring specially). However, a majority of this Court did not agree with that statement and did not join with that concurring opinion and, therefore, it is of no precedential value whatsoever. See Greene v. Massey, 384 So.2d 24, 27 (Fla.1980) ("A concurring opinion does not constitute the law of the case nor the basis of the ultimate decision unless concurred in by a majority of the Court. . . . The special concurring opinion has no precedential value and it cannot serve to condition or limit the concurrence in the [majority] opinion. . . ."); Lindsay v. Cotton, 123 So.2d 745, 746 (Fla. 3d DCA 1960) ("A concurring opinion has no binding effect as precedent; such an opinion represents only the personal view of the concurring judge and does not constitute the law of the case."). Moreover, neither the Ault court nor any other Florida court has ever addressed Ault in the class action context. Due to the uniqueness and purpose of the class action device, which allows a jury to determine liability with regard to common issues first before determining individual damages, in my view, the jury's verdict in Phase I finding Tobacco liable with regard to the common issues is a sufficient predicate to constitute a "finding of liability" under Ault. This conclusion is supported by the fact that had the jury in Phase I found Tobacco not liable with regard to the common issues of liability and general causation each class member's claim at that point would have been rendered moot, thereby precluding Phase II.

In addition, a key factor in considering whether compensatory damages should be awarded prior to a determination of entitlement to punitive damages in a class action is whether the awarding of one is critical to awarding the other. In other words, is the relative timing of the awards the deter-

minative factor? I conclude that the timing of the awards should not be the absolute controlling factor.

Compensatory and punitive damages serve distinct purposes. See Arab Termite & Pest Control of Fla., Inc. v. Jenkins, 409 So.2d 1039, 1042-43 (Fla.1982). In Arab Termite we recognized the distinction between compensatory and punitive damages, specifically:

> [T]he amount of compensation for loss is an entirely separate matter from the amount of punitive damages. Punitive damages apply to wrongdoing not covered by the criminal law, where the private injuries inflicted partake of public wrongs. They are to be measured by the enormity of the offense, entirely aside from the measure of compensation for the injured plaintiff.

Jenkins, 409 So.2d at 1042-43. In awarding punitive damages, the focus is on the defendant's conduct, not on the conduct of the plaintiff or the extent of the injury to be compensated. See Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 474 (5th Cir.1986). While the purpose of compensatory damages is "to restore the injured party to the position it would have been [in] had the wrong not been committed," Laney v. Am. Equity Inv. Life Ins. Co., 243 F. Supp. 2d 1347, 1354 (M.D. Fla. 2003), the purpose of punitive damages "is not to further compensate the plaintiff, but to punish the defendant for its wrongful conduct and to deter similar misconduct by it and other actors in the future." Owens-Corning Fiberglas Corp. v. Ballard, 749 So.2d 483, 486 (Fla.1999). "Punitive damages are appropriate when a defendant engages in conduct which is fraudulent, malicious, deliberately violent or oppressive, or committed with such gross negligence as to indicate a wanton disregard for the rights of others." W.R. Grace & Co.-Conn. v. Waters, 638 So.2d 502, 503 (Fla.1994). The punitive damage inquiry, unlike that for compensatory damages, "focuses primarily on

the egregiousness of the defendant's conduct." Watson v. Shell Oil Co., 979 F.2d 1014, 1019 (5th Cir.1992).

Moreover, the United States Supreme Court has also recognized the distinct purposes of compensatory and punitive damages:

> The former are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct. The latter, which have been described as "quasi-criminal," operate as "private fines" intended to punish the defendant and to deter future wrongdoing. A jury's assessment of the extent of a plaintiff's injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation.

Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001) (citations omitted). Punitive damages "are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974). Punitive damages "serve a broader function; they are aimed at deterrence and retribution." State Farm Mutual Auto. Ins.Co. v. Campbell, 538 U.S. 408, 416 (2003).

Entitlement to punitive damages, therefore, aimed at deterrence and retribution for a public wrong, is distinct and not dependent on the specific injury suffered by the class member. While no plaintiff in the Engle Class may ultimately receive an award of punitive damages without proving that he or she suffered actual damages in Phase III, the determination with regard to entitlement to punitive damages on a class basis need not be made concurrently with an evaluation of a particular claimant. See Sterling v. Velsicol Chemical Corp., 855 F.2d 1188, 1217 (6th Cir.1988) ("[T]he district court need not defer its award of punitive damages prior to deter-

mining compensatory damages for the entire class of 128 individuals. So long as the court determines the defendant's liability and awards representative class members compensatory damages, the district court may in its discretion award punitive damages to the class as a whole at that time.") Moreover, although the Unites States Supreme Court has recognized that "compensatory damages and punitive damages are typically awarded at the same time by the same decisionmaker," it has never held that entitlement to these damages must absolutely be assessed at the same time. Cooper Indus., Inc., 532 U.S. at 432 (emphasis supplied). Therefore, in my view, the relative timing of the assessment of entitlement to punitive damages and a compensatory damage award is not critical. See Jenkins, 782 F.2d at 474. But see Allison v. Citgo Petroleum Corp., 151 F.3d 402, 417-18 (5th Cir. 1998).

It is important to highlight the distinction between a jury determination that a class is entitled to punitive damages before compensatory damages have been actually awarded versus an actual jury award of a specific amount to a class as a lump sum punitive damage award before compensatory damages have been determined. In my view, the former comports with the requirements of due process while the latter, as the majority correctly concludes, does not. However, contrary to the conclusion reached by the majority, in my view, the trial court did not abuse its discretion in allowing the jury in Phase I of the trial plan to determine whether the class was entitled to punitive damages after liability regarding the common issues had been determined. Notwithstanding the above, I concur in the majority's holding which disapproves the trial court's trial plan in Phase II-B in which it allowed a lump sum punitive damage award to be determined prior to a determination of individual class members' compensatory damage awards, which will occur in Phase III, based on due process concerns. A simple determination of entitlement to punitive damages on a class basis does not violate Tobacco's

due process rights because no class member will be awarded punitive damages until the class member has been awarded compensatory damages in Phase III. See In re New Orleans Train Car Leakage Fire Litigation, 795 So.2d 364, 379 (La. Ct. App. 2001) (determining that there was no due process violation where the quantum of punitive damages was determined when the quantum of compensatory damages had been determined as to only 20 of 8,047 plaintiff class members). Ultimately, Tobacco will not be required to pay a class member punitive damages until that class member demonstrates his or her entitlement to compensatory damages in Phase III. Tobacco will have the opportunity to be heard at each Phase III trial with regard to why that individual plaintiff is not entitled to compensatory damages. To date, Tobacco has not been required to pay any class member a punitive damage award. Therefore, because Tobacco in Phase III will be heard with regard to each class member's compensatory damage claim before they are required to pay that class member any punitive damages, I conclude that Phases I and II-A of the trial court's trial plan did not violate Tobacco's due process rights, and that the jury's finding with regard to entitlement to punitive damages should stand. The majority today has inflicted serious harm to class actions which involve egregious behavior and has done so contrary to the clear law of Florida.

CONCLUSION

For the above reasons, I respectfully dissent from the portion of the majority opinion that reasons and holds that it was error for the trial court to allow the jury to make a determination of the entitlement of the class to punitive damages during Phase I of the trial. If the majority had properly analyzed and discussed the availability of the class action status here the contrary result on the punitive issue would have been obvious. I concur in the majority's decision in all other respects.

QUINCE, J., concurs.

WELLS, J., concurring in part and dissenting in part.

I concur with the following in the majority decision and opinion:

1. Approving the Third District Court of Appeal's reversal of the $145 billion class action punitive damages award.

2. Approving the Third District's reversal of the judgment on behalf of plaintiff Amodeo.

3. Holding that the Third District misapplied Young v. Miami Beach Improvement Co., 46 So.2d 26 (Fla.1950), to the extent that the Third District's decision would bar individual smokers' claims. I do not, though, join in the majority's opinion to the extent that it implies that there could be a proper class action for smokers' claims.

4. Holding that the trial court erred in allowing the jury to find entitlement to punitive damages in Phase I of the trial.

5. Holding that the class be decertified.

I dissent as to all other parts of the majority decision and opinion for the reasons that I will write about in this opinion. In sum, I would affirm the remainder of the Third District's extensive opinion, except that I would provide that any individual who can show that he or she relied on being a member of the class certified by the trial court in this case and based on that reliance did not bring an individual action would be allowed to file suit within one year of our decision becoming final.[15]

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[15] There is no record of how many, if any, unnamed individuals relied upon being members of the class and thus did not file an independent action. I conclude that the latest date that this class could have closed was November 21, 1996, so that individuals would have to have claims which were not barred on that date. To avoid barring any of those individuals who did in good faith rely upon being members of the class, I would order that the statute of limita-

ANALYSIS

Overview

The bottom line is that this was not properly a class action. The Third District's decision that this was not a proper class action is in accord with the overwhelming majority of courts from numerous jurisdictions. The Third Circuit in Barnes v. American Tobacco Co., 161 F.3d 127, 143 (3d Cir.1998), explains why:

> In decertifying the class, the District Court decided that "too many individual issues exist which prevent this case from proceeding as a class action." Barnes [v. American Tobacco Co.], 176 F.R.D. [479,] at 500. As noted, the District Court found that addiction, causation, and affirmative defenses all presented individual issues not properly decided in a class action. We believe that addiction, causation, the defenses of comparative and contributory negligence, the need for medical monitoring and the statute of limitations present too many individual issues to permit certification. As in Amchem [Products, Inc. v. Windsor, 521 U.S. 591 (1997)], plaintiffs were "exposed to different . . . products, for different amounts of time, in different ways, and over different periods." See Amchem, [521 U.S. at 624] (citation omitted). These disparate issues make class treatment inappropriate. [n.19]
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> [n. 19.] We note that the individual issues raised by cigarette litigation often preclude class

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tions can be avoided for those individuals or claims filed for one year from the date of our decision becoming final. An individual would have to plead and prove the avoidance as a reply to a statute of limitation affirmative defense pursuant to Florida Rule of Civil Procedure 1.100(a). I believe that this procedure would conform to what this Court allowed in Lance v. Wade, 457 So.2d 1008 (Fla.1984).

> certification. See, e.g., Castano v. The American Tobacco Co., 84 F.3d 734 (5th Cir.1996) (decertifying 23(b)(3) class because individual issues predominated); Smith v. Brown & Williamson Tobacco Corp., 174 F.R.D. 90 (W.D. Mo. 1997) (denying certification under 23(b)(1), (2) & (3) because of the presence of individual issues); Ruiz v. The American Tobacco Co., 180 F.R.D. 194 (D. Puerto Rico 1998) (denying certification under 23(b)(2) and 23(b)(3) because "cigarette addiction" claims raised too many individual issues). Significantly, no federal appeals court has upheld the certification [of] a class of cigarette smokers or reversed a District Court's refusal to certify such a class. In some state cases, however, plaintiff smokers have succeeded in certification. See Richardson v. Phillip Morris, No. 96145050/CE212596[, 1998 WL 35164799] (Baltimore Cir. Ct. Jan. 28, 1998) (certifying class of Maryland smokers seeking compensatory and punitive damages); R.J. Reynolds Tobacco Co. v. Engle, 672 So.2d 39 (Fla.App. 3 Dist. 1996), rev. denied, 682 So.2d 1100 (1996) (certification of state-wide class of tobacco smokers suing for damages caused by smoking).[16]

Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir.1996), was the initial case which comprehensively examined whether a class action could be pursued in tobacco litigation. While Castano was a class action claiming a nationwide class and the present case was limited to a Florida class,

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[16] Barnes was decided, and thus this footnote was written, before the Maryland Court of Appeals (Maryland's court of last resort) held that the class action in the Maryland case cited was not proper and decertified the class in Philip Morris v. Angeletti, 358 Md. 689, 752 A.2d 200 (2000).

much of the analysis is applicable to the present case.[17] The Castano court stated:

> The Castano class suffers from many of the difficulties that the Georgine [v. Amchem Prods., 83 F.3d 610 (3d Cir.1996),] court found dispositive. The class members were exposed to nicotine through different products, for different amounts of time, and over different time periods. Each class member's knowledge about the effects of smoking differs, and each plaintiff began smoking for different reasons. Each of these factual differences impacts the application of legal rules such as causation, reliance, comparative fault, and other affirmative defenses.

Id. at 742-43 n.15. The United States Supreme Court's analysis in Amchem Products, Inc. v. Windsor, 521 U.S. 591, 624-25 (1997), instructs on the point in rejecting a settlement of an asbestos litigation class action. Other cases with similar holdings are: Philip Morris USA Inc. v. Hines, 883 So.2d 292 (Fla. 4th DCA 2003); Estate of Mahoney v. R.J. Reynolds Tobacco Co., 204 F.R.D. 150, 156 (S.D. Iowa 2001); Badillo v. American Tobacco Co., 202 F.R.D. 261, 264 (D. Nev. 2001); Guillory v. American Tobacco Co., No. 97 C 8641, 2001 WL 290603 at *20, *24, *27 (N.D. Ill. Mar.20, 2001); Aksamit v. Brown & Williamson Tobacco Corp., No. C.A. 6:97-3636-24, 2001 WL 1809378 at *24 (D.S.C. Dec.29, 2000); Thompson v. American Tobacco Co., 189 F.R.D. 544, 551 (D. Minn. 1999); Hansen v. American Tobacco Co., No. LR-C-96-881, 1999 WL 33659388, *2, 1999 U.S. Dist. LEXIS 11277 at *7 (E.D. Ark. July 21, 1999); Insolia v. Philip Morris Inc., 186 F.R.D. 535, 546 (W.D. Wis. 1998); Emig v. American Tobacco Co., 184 F.R.D. 379, 389 (D. Kan. 1998); Barreras Ruiz v. American Tobacco Co., 180

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[17] See Susan E. Kearns, Decertification of Statewide Tobacco Class Actions, 74 N.Y.U. L.Rev. 1336 (1999).

F.R.D. 194, 197 (D.P.R.1998); Smith v. Brown & Williamson Tobacco Corp., 174 F.R.D. 90, 94 (W.D. Mo. 1997); In re Simon II, 407 F.3d 125 (2d Cir. 2005); Arch v. American Tobacco Co., Inc., 175 F.R.D. 469 (E.D. Pa. 1997).

I recognize that a problem exists in this case because of the interlocutory appeal to the Third District in which a different panel of the Third District approved a class action for a class composed of Florida smokers. But I also recognize that the 1996 decision by the Third District was made at a time when this case was only in the pleading stage. At the time of the 1996 decision, there was no trial plan with Phases I, II, and III. In fact, the three individuals who became the class representatives and who presented claims for compensatory damages, Farnan, Della Vecchia, and Amodeo, were added as class representatives after the Third District's 1996 decision. Though the trial court proceeded on the basis of the 1996 Third District decision, for the reasons stated by the Second District in Toledo v. Hillsborough County Hospital Authority, 747 So.2d 958 (Fla. 2d DCA 1999), the 1996 decision in the interlocutory appeal should not be given law-of-the-case effect: "Due to the trial court's broad authority to alter or amend orders determining class certification, the doctrine of law of the case 'applies only sparingly in class certification proceedings.' Fair Housing for Children Coalition, Inc. v. Pornchai Int'l, 890 F.2d 420, at 421 (9th Cir.1989) (unpublished disposition)." Toledo, 747 So.2d at 960. The present majority apparently agrees because the majority ultimately decertifies the class.

In what I conclude will be harmful and confusing precedent, the majority saves some of the jury findings in Phase I of the class action before decertifying the class. I do not join in doing that; rather, I would follow the overwhelming majority of courts and hold that this was not a proper class action. The result of the majority "retaining the jury's Phase I findings" is not, as the majority asserts, "pragmatic," majority op. at 1269; rather, it is problematic. Under the majority's

holding, the class closed a decade ago. Who are the individuals that are to get the use of these "findings"? How will a trial court make that determination? Does the individual only have to have an injury manifest prior to November 21, 1996, or does the individual have to have notice of the class action? Does the majority's holding mean that the statute of limitation has not run on any Florida resident's claim whose injury manifested prior to November 21, 1996? How long do individuals have to file such individual actions? How are these findings to be used in cases in which the findings are used? I assume that any individual cases filed on claims in which injuries manifested on November 22, 1996, or later do not get the benefit of these findings, so that there will be two classes of claimants. These are only a few of the issues which arise in application of the majority's holding.

Punitive Damages

As previously stated, I concur in the majority's holding that agrees with the Third District that the trial court erred in allowing the jury to consider entitlement to punitive damages during the Phase I trial. I do not concur, however, with the majority's opinion that an award of compensatory damages is not a prerequisite to a finding of entitlement to punitive damages and that an award of compensatory damages need not precede a determination of entitlement to punitive damages. I do not concur because the majority's opinion is in conflict with the Supreme Court's decisions in BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), and State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408, 418, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003).

The Supreme Court has made it clear that punitive damages must be in ratio to compensatory damages. In fact, the majority quotes a passage from the Campbell decision which makes this clear. It necessarily follows, then, that there must be compensatory damages in order for punitive damages to be in ratio to compensatory damages. Thus, I conclude that

the majority decision here is in conflict with the Supreme Court decisions and is thereby erroneous.

Law-of-the-Case Class Certification

I have previously stated why the law-of-the-case doctrine should not apply to the Third District's 2003 review of this case, which followed the Phase I and Phase II jury trials and judgments. Florida Department of Transportation v. Juliano, 801 So.2d 101 (Fla. 2001), should not be applied in this class action. Moreover, since the majority ends up decertifying the class, I fail to understand the point of the majority's discussion of this issue. Majority op. at 1265-67.

The Third District in its 2003 opinion correctly explains why the law-of-the-case doctrine does not apply. Liggett Group, Inc. v. Engle, 853 So.2d 434, 443 n. 4 (Fla. 3d DCA 2003). Furthermore, as the majority states, "Of course, this Court is not bound by the Third District's law of the case." Majority op. at 1267.

In the present case, the trial plan was not decided by the trial court until after the 1996 interlocutory appeal. The defendants objected to the trial plan and moved to decertify the class. The trial court denied the motion, although it expressed reservations about the manageability of the case and predicted that the necessary individual hearings will place a serious demand upon Florida's judicial resources. The denial of the defendant's motion to decertify was then appealed to the Third District. The Third District dismissed the appeal for lack of jurisdiction but expressly stated that the defendants had a right to obtain review of the propriety of the order by plenary appeal from any adverse judgment. Engle, 853 So.2d at 443. But now the majority in this Court makes the trial plan unreviewable in the district court by applying the law of the case to the earlier certification. Certainly, the trial plan should have been reviewable by the district court as part of a review of the motion to decertify after the trial plan

was ordered.[18] It was the trial plan which demonstrated just how unworkable this class action was and why the class should have been decertified. It was the trial plan which resulted in the errors upon which the majority in this Court reverses the trial court's final judgment.

It was the trial plan which resulted in the Phase I jury deciding whether the defendants were negligent, breached warranties, were strictly liable, or were guilty of fraud and misrepresentation, but Phase II decided the claimant's comparative fault. Such a bifurcation of issues violates article I, section 22 of the Florida Constitution, just as the Fifth Circuit in Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996), found that such a bifurcation of issues violated the Seventh Amendment to the United States Constitution.

The Castano court explained why a bifurcation of the comparative negligence issue from the defendant's negligence issue with a trial by separate juries is a violation of the Seventh Amendment to the United States Constitution:

> Another factor weighing heavily in favor of individual trials is the risk that in order to make this

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[18] See William Dodds, Trial Plans Come to Class Action Arena, 226 N.Y. Law J. (Aug. 13, 2001) at 2:

> Faced with actions that seek to aggregate claims of increasingly broad and disparate groups of plaintiffs, many courts across the country now require that plaintiffs, and sometimes both parties, prepare detailed trial plans at the time of or in advance of class certification. For example, in In re Ford Motor Company Vehicle Paint Litigation, 182 F.R.D. 214, 224 (E.D. La. 1998), the district court required the plaintiff to submit a trial plan, saying it was constrained from "certifying a class now and worrying about how to try it later." Similarly, in Southwestern Refining Co., Inc. v. Bernal, 22 S.W.3d 425, 435 (Tex. 2000), the Texas Supreme Court declared that "it is improper to certify a class without knowing how the claims can and will likely be tried," requiring plaintiffs to submit trial plans prior to certification.

class action manageable, the court will be forced to bifurcate issues in violation of the Seventh Amendment. This class action is permeated with individual issues, such as proximate causation, comparative negligence, reliance, and compensatory damages. In order to manage so many individual issues, the district court proposed to empanel a class jury to adjudicate common issues. A second jury, or a number of "second" juries, will pass on the individual issues, either on a case-by-case basis or through group trials of individual plaintiffs.

The Seventh Amendment entitles parties to have fact issues decided by one jury, and prohibits a second jury from reexamining those facts and issues. [n. 30] Thus, Constitution allows bifurcation of issues that are so separable that the second jury will not be called upon to reconsider findings of fact by the first:

> [T]his Court has cautioned that separation of issues is not the usual course that should be followed, and that the issue to be tried must be so distinct and separable from the others that a trial of it alone may be had without injustice. This limitation on the use of bifurcation is a recognition of the fact that inherent in the Seventh Amendment guarantee of a trial by jury is the general right of a litigant to have only one jury pass on a common issue of fact. The Supreme Court recognized this principle in Gasoline Products [Co., Inc. v. Champlin Refining Co., 283 U.S. 494 (1931)]. . . . The Court explained . . . that a partial new trial may not be "properly resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." Such a rule is dictated for the very

> practical reason that if separate juries are allowed to pass on issues involving overlapping legal and factual questions the verdicts rendered by each jury could be inconsistent.

Alabama v. Blue Bird Body Co., 573 F.2d 309, 318 (5th Cir.1978) (citations and footnotes omitted).

> [n. 30] "[N]o fact tried by jury, shall be otherwise re-examined in any Court of the United States . . ." U.S. Const. amend VII.

The Seventh Circuit recently addressed Seventh Amendment limitations to bifurcation. In [In re] Rhone-Poulenc [Rorer, Inc.], 51 F.3d [1293] at 1302-03, Chief Judge Posner described the constitutional limitation as one requiring a court to "carve at the joint" in such a way so that the same issue is not reexamined by different juries. "The right to a jury trial . . . is a right have juriable issues determined by the first jury impaneled to hear them (provided there are no errors warranting a new trial), and not reexamined by another finder of fact." Id. at 1303.

Severing a defendant's conduct from comparative negligence results in the type of risk that our court forbade in Blue Bird. Comparative negligence, by definition, requires a comparison between the defendant's and the plaintiff's conduct. Rhone-Poulenc, 51 F.3d at 1303 ("Comparative negligence entails, as the name implies, a comparison of the degree of negligence of plaintiff and defendant.") At a bare minimum, a second jury will rehear evidence of the defendant's conduct. There is a risk that in apportioning fault, the second jury could reevaluate the defendant's fault, determine that the defendant was not at fault, and apportion 100% of the fault to the plaintiff. In such a situation, the second jury would be impermissibly reconsidering the findings

> of a first jury. The risk of such reevaluation is so great that class treatment can hardly be said to be superior to individual adjudication.

84 F.3d at 750-51. Every smoker's case has a substantial comparative fault defense.

The majority's opinion approves one jury making the decision on the defendant's negligence and a different jury making a decision on the plaintiff's negligence and comparing the two. The second jury will be required to accept the first jury's findings as to the defendant's negligence and then in some way compare the defendant's negligence with the second jury's finding as to the plaintiff's negligence. It is only logical that comparative negligence, which the second jury will be finding, is an evaluation of how the negligence of the two parties relate. That can only be accomplished by weighing the evidence of each party's negligence as a cause of the defendant's negligence, which the majority's bifurcation of negligence and comparative negligence prevents from occurring on the basis of one jury's findings. Similarly, there is no logical way to decide the issues of misrepresentation and the element within misrepresentation of reliance by separate juries without having the second jury required to accept the findings of the first jury. Both constitutionally and practically, these are issues which should be decided by one fact-finder so that there is consistency in the resolution of the facts.

The majority states that it will follow the Fifth Circuit's two-to-one majority opinion in Mullen v. Treasure Chest Casino, LLC, 186 F.3d 620, 628-29 (5th Cir.1999), rather than the Fifth Circuit's decision in Castano. I cannot agree. Mullen was not a smoker's case. Mullen was a case brought under the federal Jones Act,[19] in which the claims by the individuals were from the same defective ventilation system in a floating casino that occurred over the same general period

[19] 46 U.S.C. § 688 (1988).

of time. The Mullen majority pointed out that these were important distinguishing facts from Castano and from the asbestos case decided by the Supreme Court in Amchem Products, Inc. Moreover—and very significantly—the Mullen majority specifically pointed out that as in Treasure Chest, the defendant in the Mullen case did not raise in the trial court the Seventh Amendment issue of having one jury consider the defendant's conduct and another consider the plaintiffs' comparative negligence. I find the dissent in Mullen, which adheres to Castano and In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1302-03 (7th Cir.1995), to be the view which is correct for smokers' cases in Florida.

Finally, the majority opinion decides that the cut-off date for class membership should be November 21, 1996. Majority op. at 1274. This was, of course, after the Third District decision in the interlocutory appeal, which was issued on January 31, 1996. R.J. Reynolds Tobacco Co. v. Engle, 672 So.2d 39 (Fla. 3d DCA 1996). It is wholly inconsistent for the majority to apply the law of the 1996 case to prevent the Third District's 2003 review of the certification and to also hold that the cut-off date for the class was after the 1996 review. This results in the actual order of certification being unreviewable in the district court.

Closing Arguments and Individual Judgments

I dissent from the majority's decision that the blatantly improper closing arguments do not require reversal. The Third District's decision concerning this offensive argument was precisely correct. There is no way to read the argument of plaintiff's counsel other than to conclude that it dwelled upon issues which are and should be per se reversible error because the arguments were intended to have jurors make their decisions on issues which had no relevancy or materiality in the case. These arguments were extreme in my view. I will not join in a decision which affirms judgments which in part are a result of such arguments.

It is because of the closing arguments that the judgments for compensatory damages on behalf of Farnan and Della Vecchia against the defendants other than Liggett and Brooke[20] must be reversed. Additionally, the individual verdicts cannot stand because the closing argument in Phase I was not only materially tainted by racial pandering and pleas for nullification but was also materially tainted by arguments which would have only been appropriate in seeking punitive damages. Since, as the majority has held, it was improper for the trial court to allow the Phase I jury to consider punitive damages, the arguments in support of punitive damages were improper and wrongfully prejudiced the defendants from receiving a fair trial in Phase I. This is still another reason why it is error for the majority to allow some of the Phase I jury findings to stand.

CONCLUSION

For the foregoing reasons, I concur with the majority's reversal of the $145 billion judgment; reversal of the judgment in behalf of Amodeo; holding that the Third District misapplied Young v. Miami Beach Improvement Co., 46 So.2d 26 (Fla.1950); and holding that the trial court erred in allowing the jury to find entitlement to punitive damages in Phase I of the trial. I dissent to all other parts of the majority decision and opinion.

BELL, J., concurs.

Application for Review of the Decision of the District Court of Appeal – Direct Conflict of Decisions

Third District – Case Nos. 3D00-3206, 3D00-3207, 3D00-3208, 3D00-3210, 3D00-3212, 3D00-3215, and 3D00-3400

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[20] The majority held that the Third District was correct that the judgments against Liggett and Brooke should be reversed on other grounds. I agree.

(Dade County)

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for Respondents

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Frankel, Matthew L. Myers, and Michael Stroud, Washington, D.C. on behalf of Trial Lawyers for Public Justice and Public Citizen, the Campaign for Tobacco-Free Kids, and the American Cancer Society; Stephen P. Teret and Jon S. Vernick, Center for Law and the Public's Health, Johns Hopkins Bloomberg School of Public Health, Baltimore, Maryland, and John B. Ostrow, Miami, Florida on behalf of American Public Health Association, American Medical Association, American Academy of Pediatrics, American Heart Association, American Lung Association, American Legacy Foundation and Roswell Park Cancer Institute, Sylvester Comprehensive Cancer Center/University of Miami Hospital and Clinics and the Women's Cancer League of Greater Miami; Phillip Timothy Howard of Howard and Associates, P.A., Tallahassee, Florida, Douglas Blanke, Executive Director, William Mitchell College of Law, Saint Paul, Minnesota, Richard A. Daynard, Ph.D., Robert L. Kline and Christopher Banthin, Northeastern University School of Law, Boston, Massachusetts on behalf of Tobacco Control Legal Consortium and Tobacco Control Resource Center; Roy C. Young of Young Van Assenderp, Tallahassee, Florida, John H. Beisner, John F. Niblock and Jessica Davidson Miller of O'Melveny and Myers, LLP, Washington, D.C., and Robin S. Conrad, National Chamber Litigation Center, Inc., Washington, D.C., on behalf of the Chamber of Commerce of the United States; Rebecca O'Dell Townsend of Haas, Dutton, Blackburn, Lewis and Longley, P.L., Tampa, Florida, Daniel J. Popeo and David Price, Washington, D.C., on behalf of Washington Legal Foundation and National Association of Manufacturers,

for Amici Curiae

APPENDIX B

[Opinion of the District Court of Appeal of Florida, Third District (May 21, 2003)]

LIGGETT GROUP INCORPORATED; Brooke Group Limited; Philip Morris Incorporated; Council for Tobacco Research-USA, Incorporated; Tobacco Institute, Incorporated; Lorillard Tobacco Company; Lorillard, Incorporated; Brown & Williamson Tobacco Corporation; American Tobacco Company; and R.J. Reynolds Tobacco Company, Appellants,

v.

Howard A. ENGLE, M.D., et al., Appellees.

Nos. 3D00-3400, 3D00-3206 to 3D00-3208, 3D00-3210, 3D00-3212, 3D00-3215.

District Court of Appeal of Florida,

Third District.

May 21, 2003.

Rehearing and Rehearing En Banc Denied Sept. 22, 2003.

Steel Hector & Davis, and Alvin B. Davis; Clarke Silverglate Campbell Williams & Montgomery, and Mercer B. Clarke, and Kelly A. Luther; Kasowitz, Benson, Torres & Friedman, and Marc E. Kasowitz, Daniel R. Benson, and Aaron H. Marks (New York), for Appellants, Liggett Group Inc. and Brooke Group Holding, Inc.

Shook, Hardy & Bacon, and Norman A. Coll; Winston & Strawn, and Dan K. Webb, and Stuart Altschuler (Chicago, Illinois); Dechert Price & Rhoads, and Robert C. Heim, and Joseph Patrick Archie (Philadelphia, Pennsylvania), for Appellant, Philip Morris Incorporated.

Carlton Fields, and Benjamine Reid, and Wendy F. Lumish; Jones, Day, Reavis & Pogue, and James R. Johnson, and Diane G. Pulley (Atlanta, Georgia); Jones, Day, Reavis & Pogue, and Robert H. Klonoff, and Charles R.A. Morse (Washington, D.C.), for Appellant, R.J. Reynolds Tobacco Company.

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Greenberg Traurig, and Arthur J. England, Jr., and David L. Ross, and Elliot H. Scherker; Shook, Hardy & Bacon, and James T. Newsom (Kansas City, Missouri), for Appellants, Lorillard, Inc., and Lorillard Tobacco Company.

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Stanley M. Rosenblatt, and Susan Rosenblatt, for Appellees.

Before LEVY, GERSTEN, and GODERICH, JJ.

GERSTEN, J.

This is an appeal from a final judgment in a smokers' class action law suit seeking damages against cigarette companies and industry organizations for alleged smoking related injuries. The final judgment awarded $12.7 million in compensatory damages to three individual plaintiffs, and $145 billion in punitive damages to the entire class. We reverse with instructions that the class be decertified.

I. Overview

In May of 1994, six named individuals filed a class action complaint seeking damages for injuries allegedly caused

by smoking. All six alleged they were unable to stop smoking because they were addicted to nicotine and, as a result, developed medical problems ranging from cancer and heart disease to colds and sore throats. They sought over $100 billion in compensatory damages on theories of strict liability, negligence, breach of express warranty, breach of implied warranty, fraud, conspiracy to commit fraud, and intentional infliction of emotional distress. In addition, the plaintiffs sought over $100 billion in punitive damages on their claims for fraud, conspiracy, and emotional distress. The defendants are the major domestic cigarette companies and two industry organizations (hereafter collectively referred to as "defendants").[1]

The class of smokers and their survivors (hereafter collectively referred to as "plaintiffs") was certified in October of 1994 as a nationwide class action under Florida Rule of Civil Procedure 1.220(b)(3). The trial court defined the class as: "All United States citizens and residents, and their survivors, who have suffered, presently suffer or have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine."

Thereafter in 1996, this Court reduced the class to include Florida smokers only. *R.J. Reynolds Tobacco Co. v. Engle*, 672 So.2d 39 (Fla. 3d DCA 1996). This Court did not approve any trial plan for the case, because no trial plan had been issued at that time.

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[1] The defendant cigarette companies are: Philip Morris Incorporated ("Philip Morris"); R.J. Reynolds Tobacco Company ("Reynolds"); Brown & Williamson Tobacco Corporation, individually and as successor by merger to The American Tobacco Company ("Brown & Williamson" or "B & W"); Lorillard Tobacco Company and Lorillard, Incorporated (collectively, "Lorillard"); and Liggett Group Incorporated and Brooke Group Holding Incorporated (collectively, "Liggett"). The defendant industry organizations are The Council for Tobacco Research-U.S.A., Incorporated ("CTR") and The Tobacco Institute, Incorporated ("TI").

In February of 1998, the trial court issued its first trial plan, which provided for the trial proceedings to be divided into three phases.[2] Phase 1 consisted of a year-long trial on liability and entitlement to punitive damages. The jury considered common issues relating exclusively to defendants' conduct and the general health effects of smoking. At the conclusion of Phase 1, the jury rendered a verdict for the class on all counts.

In Phase 2, the jury determined that the three individual class representatives were entitled to compensatory damages in varying amounts which were offset by their comparative fault. The total award was $12.7 million. Thereafter, the jury determined the lump-sum amount of punitive damages for the entire class to be $145 billion, without allocation of that amount to any class member.

The defendants filed several post-verdict motions, including motions for remittitur and class decertification. The trial court did not hold hearings on the post-verdict motions.

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[2] The trial court subsequently made changes in the plan, both before and during the trial. A major change in the plan concerned the method of assessing punitive damages. The original plan provided that in Phase 1, after trying certain "common issues," the jury would determine the potential entitlement of subclasses to punitive damages and then determine a "basis or ratio" for computing punitive damages individually for each class member within each subclass. In Phase 2, the jury would determine the individual liability and compensatory-damage claims of each named plaintiff, and then the punitive "basis or ratio" would be applied to each plaintiff's compensatory award (if any) to determine his or her punitive award. However, after the jury returned its Phase 1 verdict, and before the Phase 2 trial began, the court abandoned the "basis or ratio" method. Instead the court determined the jury would assess punitive damages as a lump sum with respect to the entire class. No allocation would be made of that amount to any of the named plaintiffs, nor to any particular class member. The defendants objected to the original and to subsequent versions of the plan.

Instead, in November of 2000, the trial court entered an "Omnibus Order on All Pending Motions" denying most of the defense motions, with two minor exceptions.[3] The Omnibus Order granted judgment in the plaintiffs' favor in all other respects, ordering immediate payment to the individual plaintiffs, and directing the defendants to immediately pay the $145 billion in punitive damages into the court registry for the benefit of the entire class. The trial court reserved jurisdiction to "conduct further proceedings pursuant to the mandate of the Third District Court of Appeal"-an apparent reference to the coming Phase 3 trials and this Court's 1996 ruling that individual hearings are required "on at least the issue of damages, if not other issues as well." *R.J. Reynolds Tobacco Co. v. Engle*, 672 So.2d at 41.

In Phase 3, which has not yet begun, new juries will decide the individual liability and compensatory damages claims for each class member (estimated to number at least 700,000). The trial court will then divide the $145 billion punitive damages award equally among the successful class members. Pursuant to the Omnibus Order, interest on the $145 billion punitive award began accruing immediately at $14.5 billion annually. The defendants now appeal the adverse Omnibus Order.

II. Class Decertification Required

Although the emotional appeal of the class representatives' claims is compelling, our job as appellate judges is not

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[3] In its Omnibus Order, the court granted judgment in the defendants' favor in two respects. First, it ruled that the claims of named plaintiff Mr. Amodeo were time-barred with respect to strict liability, negligence, breach of warranty, and intentional infliction of emotional distress. However, it ruled that Mr. Amodeo's fraud and conspiracy claims were not time barred. Second, the court granted judgment for the defendants on the plaintiffs' claim for equitable relief, pursuant to a prior dismissal of that claim.

to be swayed by emotion where to do so results in violating established legal principles. The law in the instant case clearly mandates that the trial court order certifying the class be reversed, with instructions that the class members may pursue their claims on an individualized basis.

Under Florida Rule of Civil Procedure 1.220(d)(1), a class-certification order may be altered or amended at any time before entry of a judgment on the merits. Class-certification orders necessarily precede substantial development of the issues and facts. For this reason, a court is required to reassess its class rulings as the case develops. *See Barnes v. American Tobacco Co.*, 161 F.3d 127, 140 (3d Cir.1998); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Product Liab. Litig.*, 55 F.3d 768, 792 n.14 (3d Cir.1995); Stott v. Haworth, 916 F.2d 134, 139 (4th Cir.1990); *Kuehner v. Heckler*, 778 F.2d 152, 163 (3d Cir.1985); *Richardson v. Byrd*, 709 F.2d 1016, 1019 (5th Cir.1983). Thus, even after a certification order is entered, "the judge remains free to modify it in the light of subsequent developments in the litigation." *Forehand v. Florida State Hosp.*, 89 F.3d 1562, 1566 (11th Cir.1996).

In 1996, this Court affirmed as modified the trial court order certifying the class. *See R.J. Reynolds Tobacco Co., et al. v. Engle, et al.*, 672 So.2d 39 (Fla. 3d DCA 1996). At that time, we limited the case to a Florida-only class based upon our finding that a nationwide class would be unmanageable because it would comprise in excess of one million class members. See *R.J. Reynolds Tobacco Co., et al. v. Engle, et al.*, 672 So.2d at 41. This was the first smokers' case to be certified as a class action anywhere in the country. At the time of certification, no trial plan had been issued and the plaintiffs estimated the class size at approximately 300,000 people.

Two years after class certification, the trial court issued its first trial plan. As finally implemented, the plan provided that trial would be divided into three phases. In Phase 1,

which has been completed, the jury made a general finding that smoking causes some, but not all, of the diseases in issue and that cigarettes containing nicotine are addictive. The jury also made a general finding that the defendants had engaged in unspecified conduct that "rose to a level that would permit a potential award or entitlement to punitive damages."

In Phase 2, which has also been completed, the same jury found the three class representatives established liability and compensatory damages with respect to their individual claims. The jury then awarded a lump sum of $145 billion dollars in punitive damages to the entire class, without allocation to any class member.

The trial plan provides that Phase 3, which has not yet begun, will consist of a series of individual trials before new juries to determine whether the defendants are liable to the other class members, and the amount of any compensatory damages. The plaintiffs have now more than doubled their original estimate of class size from 300,000 to at least 700,000. After completion of the estimated 700,000 or more class member individual trials, the plan provides that the trial court will then equally divide the $145 billion dollar lump-sum punitive award among the successful class members.

The defendants objected to the trial plan and filed their first motion to decertify the class in 1998. The trial court denied the motion, although it expressed "reservations about the manageability of this case" and predicted that "the necessary individual hearings will place a serious demand upon Florida's judicial resources."

The denial of decertification was then appealed to this Court. This Court dismissed the appeal for lack of jurisdiction, but expressly stated that the defendants had a right to obtain review of "the propriety of the order by plenary appeal from any adverse final judgment."[4]

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[4] The plaintiffs' "law of the case" argument in response to the decertification issues raised in this appeal clearly lacks merit in light

In the years since initial affirmance of certification in 1996, virtually all courts that have addressed the issue have concluded that certification of smokers' cases is unworkable and improper. *See Barnes v. American Tobacco Co.*, 161 F.3d 127 (3d Cir.1998), *cert. denied*, 526 U.S. 1114, 119 S.Ct. 1760, 143 L.Ed.2d 791 (1999); *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir.1996); *Estate of Mahoney v. R.J. Reynolds Tobacco Co.*, 204 F.R.D. 150 (S.D. Iowa 2001); *Badillo v. American Tobacco Co.*, 202 F.R.D. 261 (D.Nev.2001); *Guillory v. American Tobacco Co.*, 2001 U.S. Dist. LEXIS 3353 (N.D.Ill. Mar. 19, 2001); *Aksamit v.*

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of this Court's March 6, 1998 order expressly stating: "Appellants/petitioners may however, review the propriety of the order [denying decertification] by plenary appeal from any adverse final judgment." The "law of the case" doctrine, in any event, has only limited application to class-certification decisions. Such decisions remain conditional and subject to reconsideration until the case is finally resolved. *See* Fla. R. Civ. P., Rule 1.220(d)(1) (class certification order may be altered or amended any time before entry of judgment on the merits); *see also, Toledo v. Hillsborough County Hosp. Auth.*, 747 So.2d 958, 960 (Fla. 2d DCA 1999)(rejecting "law of the case" challenge to trial court's decision to decertify, even though the appellate court had previously affirmed the initial class certification); *Hebert v. Monsanto Co.*, 682 F.2d 1111, 1132 (5th Cir.1982) (law of the case is inapplicable to Federal Rule 23); *Zenith Laboratories, Inc. v. Carter-Wallace, Inc.*, 530 F.2d 508, 512 (3d Cir.1976) (same). Even the trial court acknowledged that this Court's prior approval of class certification was "preliminar[y]," and this Court has specifically noted that "law of the case is inapplicable if there is even an arguable change in the substantive evidence presented." *Metro. Dade County v. Martino*, 710 So.2d 20, 22 (Fla. 3d DCA 1998); *see City of Miami v. Bell*, 606 So.2d 1183, 1185 (Fla. 1st DCA 1992)(the "law of the case" doctrine was "not meant to create vested rights in decisions that have become obsolete or erroneous with time"), *quashed in part*, 634 So.2d 163 (Fla.1994). The "law of the case" doctrine clearly does not foreclose decertification.

Brown & Williamson Tobacco Corp., 2000 U.S. Dist. LEXIS 18880 (D.S.C. Dec. 29, 2000); *Walls v. American Tobacco Co.*, 2000 U.S. Dist. LEXIS 16040 (N.D. Okla. Oct. 19, 2000); *Chamberlain v. American Tobacco Co.*, 70 F.Supp.2d 788 (N.D. Ohio 1999); *Hansen v. American Tobacco Co.*, 1999 U.S. Dist. LEXIS 11277 (E.D. Ark. July 21, 1999); *Thompson v. American Tobacco Co.*, 189 F.R.D. 544 (D.Minn.1999); *Clay v. American Tobacco Co.*, 188 F.R.D. 483 (S.D. Ill.1999); *Insolia v. Philip Morris, Inc.*, 186 F.R.D. 535 (W.D. Wis.1998); *Emig v. American Tobacco Co.*, 184 F.R.D. 379 (D. Kan.1998); *Barreras Ruiz v. American Tobacco Co.*, 180 F.R.D. 194 (D.P.R.1998); *Smith v. Brown & Williamson Tobacco Corp.*, 174 F.R.D. 90 (W.D. Mo.1997); *Tijerina v. Philip Morris Inc.*, 1996 WL 885617 (N.D.Tex. Oct.8, 1996); *Philip Morris, Inc. v. Angeletti*, 358 Md. 689, 752 A.2d 200 (2000); *Reed v. Philip Morris, Inc.*, 1997 WL 538921 (D.C. Super. Ct. Aug. 18, 1997), *and on second motion*, No. 96-5070 (D.C. Super. Ct. July 23, 1999); *Small v. Lorillard Tobacco Co.*, 252 A.D.2d 1, 679 N.Y.S.2d 593 (1998), *aff'd*, 94 N.Y.2d 43, 698 N.Y.S.2d 615, 720 N.E.2d 892 (1999); *Geiger v. American Tobacco Co.*, 181 Misc.2d 875, 696 N.Y.S.2d 345 (N.Y. Sup. Ct. 1999), *aff'd*, 277 A.D.2d 420, 716 N.Y.S.2d 108 (N.Y. App. Div. 2000).

These class action decisions all applied rules that are functionally identical to Florida's class action rules.[5] In many instances these courts denied certification based upon the demonstrated problem in the instant case. Simply, that the plaintiffs smokers' claims are uniquely individualized and cannot satisfy the "predominance" and "superiority" re-

[5] We note further that since Florida's class action provision, Florida Rule of Civil Procedure 1.220, is based upon Federal Rule of Civil Procedure 23, federal precedents are persuasive authority in our construction of Florida's class action rules. *See Concerned Class Members v. Sailfish Point, Inc.*, 704 So.2d 200, 201 (Fla. 4th DCA 1998).

quirements imposed by Florida's class action rules.[6] See *Barnes v. American Tobacco Co.*, 161 F.3d at 149 (certification improper because smokers' claims involve "individual issues" such as "nicotine addiction, causation, . . . contributory/comparative negligence and the statute of limitations"); *Badillo v. American Tobacco Co.*, 202 F.R.D. at 263-65 (proposed class of persons exposed to second-hand smoke improper for certification because of individual issues of "causation, comparative fault, assumption of the risk, product identification, statute of limitations, and damages"); *Thompson v. American Tobacco Co.*, 189 F.R.D. at 551-52 (refusing to certify because individual issues predominated); *Emig v. American Tobacco Co.*, 184 F.R.D. at 387-95 (refusing to certify because smokers' claims are individualized); *Barreras Ruiz v. American Tobacco Co.*, 180 F.R.D. at 196-99 (refusing to certify for failure to satisfy requirements of commonality, representativeness, and fairness).[7]

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[6] Rule 1.220, sets forth the prerequisites for class certification and reads in pertinent part:

> "(a) Prerequisites to Class Representation. Before any claim . . . may be maintained on behalf of a class by one party or more suing . . . as the representative of all the members of a class, the court shall first conclude that (1) the members of the class are so numerous that separate joinder of each member is impracticable, (2) the claim . . . of the representative party raises questions of law or fact common to the questions of law or fact raised by the claim . . . of each member of the class, (3) the claim . . . of the representative party is typical of the claim . . . of each member of the class, and (4) the representative party can fairly and adequately protect and represent the interests of each member of the class."

[7] Moreover, this Court and other Florida courts have recognized the impropriety of class certification in cases comparable to this one. *See Norwegian Cruise Lines Ltd. v. Rose*, 784 So.2d 1248,

To be certified, a class must satisfy the prerequisites of Florida Rule of Civil Procedure, Rule 1.220. Rule 1.220(a) requires that common issues of law predominate over the different individual issues at the core of each class member's claim. *See Stone v. Compuserve Interactive Serv's, Inc.*, 804 So.2d 383 (Fla. 4th DCA 2001). This "predominance" or "commonality" requirement is not satisfied, where claims involve factual determinations unique to each plaintiff. See *Execu-Tech Bus. Sys. Inc. v. Appleton Papers, Inc.*, 743 So.2d 19 (Fla. 4th DCA 1999).

Rule 1.220 also requires that class representation be superior to other available methods of fairly and efficiently adjudicating the claims presented. *See Castano v. American Tobacco Co.*, 84 F.3d at 734; *Emig v. American Tobacco Co.*, 184 F.R.D. at 379; *Humana, Inc. v. Castillo*, 728 So.2d 261 (Fla. 2d DCA 1999). If significant individual issues ex-

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1248 (Fla. 3d DCA 2001) (reversing certification of class of cruise ship passengers who became ill by ship's food and water due to "insufficient commonality"); *Stone v. Compuserve Interactive Services, Inc.*, 804 So.2d 383 (Fla. 4th DCA 2001) (upholding denial of certification because of individualized fact issues and numerous differences in state laws governing different class members' claims); *Chateau Communities, Inc. v. Ludtke*, 783 So.2d 1227, 1231 (Fla. 5th DCA 2001)(reversing certification of mobile home owners class asserting fraud claims because a host of issues would have to be considered individually); see also *Hoechst Celanese Corp. v. Fry*, 753 So.2d 626, 628 (Fla. 5th DCA)(reversing certification of class of plumbing system owners asserting fraud claims because individual issues "not only predominate, but overwhelm, any common issues"), *rev. denied*, 773 So.2d 55 (Fla. 2000); *Execu-Tech Bus. Sys., Inc. v. Appleton Papers, Inc.*, 743 So.2d 19 (Fla. 4th DCA 1999)(affirming refusal to certify class of fax paper purchasers alleging unfair trade practices since individual issues predominate); *Humana, Inc. v. Castillo*, 728 So.2d 261, 264 ("class actions seeking relief from separate contracts on the basis of fraud, whatever the genesis of the fraud, are prohibited"), *rev. dismissed*, 741 So.2d 1134 (Fla.1999).

ist, little value is gained by proceeding as a class action. Not only would the lawsuit become unmanageable, it would further be unjust to bind absent class members to a negative decision where the class representative's claims present different individual issues than those of the absent members. Under these circumstances, class representation would not be "superior" to individual suits for the fair and efficient adjudication of the controversy. *See* Fla. R. Civ. P. 1.220(b)(3).

Phase 2 of the trial conclusively established that individualized issues of liability, affirmative defenses, and damages, outweighed any "common issues" in this case, and that class representation is not superior. Specifically, concrete proof relating to the class representatives; Mr. Amodeo, Ms. Farnan, and Ms. Della Vecchia, established that individualized issues predominate and render further proceedings unmanageable.[8]

As evidenced by the proceedings in Phase 2, each claimant will have to prove that his or her illness not only was caused by smoking, but was also proximately caused by defendants' alleged misconduct.[9] For example, with respect to

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[8] After the year-long "common issues" trial in Phase 1, it took another five months to try the claims of just three individuals. Each of these three class representatives' cases required lengthy proof to establish the individualized elements of their claims. In Phase 3, each of the hundreds of thousands of others (at least 700,000 by the plaintiffs' estimate) will necessarily have to do the same.

[9] Phase 2 effectively demonstrated that specific medical causation is inherently individualized. For example, even though Ms. Farnan and Ms. Della Vecchia both developed "lung cancer," at least fourteen different experts were required to testify on that issue. With respect to Ms. Farnan, plaintiffs presented extensive testimony about her two independent primary cancers, her family history of cancer, her unique symptomology, and whether her lung cancer was really a BAC form of lung cancer (which the jury in Phase I had decided was not caused by smoking). With respect to Ms. Della Vecchia, there was extensive evidence about her treatment

any misrepresentation claim, each Phase 3 claimant will have to prove that he or she actually and reasonably relied on a false statement of material fact. This requires an individualized showing of reliance.[10] *See Shoma Dev. Corp. v. Vazquez*, 749 So.2d 1287, 1289 (Fla. 3d DCA 2000)(class action not appropriate for fraud claims; reliance of one purchaser does not establish that of others); *Castano v. American Tobacco Co.*, 84 F.3d at 745 ("fraud class action cannot be certified when individual reliance will be an issue"); *Clay v. American Tobacco Co.*, 188 F.R.D. at 492 (denying certification of claims alleging fraudulent marketing of cigarettes because "all members of the proposed class were not sub-

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regime, unique medical history, and whether she had a "scar cancer" which is a different type of cancer also not associated with smoking.

[10] There is no legal or factual support for the plaintiffs' "presumed reliance" argument. The plaintiffs suggest that class-wide liability can be created by presuming that every class member actually and reasonably relied on whatever unspecified statement(s) the jury found in Phase 1 to be false. The fatal flaw in this argument is that the plaintiffs never proved that every class member even saw or heard whatever statement(s) the Phase 1 verdict rests upon. Moreover, Florida law bars any presumption of reliance in cases involving fraud. *See Humana, Inc. v. Castillo*, 728 So.2d 261, 264-65 (Fla. 2d DCA 1999) (reliance requirement in common-law fraud cases cannot be satisfied by assumptions; class actions seeking relief from separate contracts on the basis of fraud are prohibited, irrespective of the genesis of the fraud); *but see Davis v. Powertel, Inc.*, 776 So.2d 971 (Fla. 1st DCA 2000) (damage claims brought pursuant to Florida Deceptive and Unfair Trade Practices Act are different from common law fraud claims because plaintiff need not demonstrate individual reliance on relevant representation or omission and, therefore, such claims may be asserted on behalf of a class), *review denied*, 794 So.2d 605 (Fla.2001).

jected to the same advertising and that advertising did not have a similar effect on all members.").[11]

Because each class member had unique and different experiences that will require the litigation of substantially separate issues, class representation is not "superior" *447 to individual suits. *See Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180 (9th Cir.2001); *Haley v. Medtronic, Inc.*, 169 F.R.D. 643 (C.D. Cal.1996); see also *Barnes*, 161 F.3d at 145-46 (proof of general causation in cigarette litigation does not establish tort liability); *In re "Agent Orange" Product Liab. Litig.*, 818 F.2d 145, 164-65 (2d Cir.1987) (Main issue "is not whether [defendant's product] has the capacity to cause harm, the generic causation issue, but whether it did cause harm and to whom.").

This is further evidenced by the fact that affirmative defenses and damages must be litigated individually.[12] This

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[11] The Phase 2 trial also evidenced that individualized inquiries with regard to each smoker's awareness of the health risks of smoking at various points in time will be required in the Phase 3 trial. For example, Ms. Farnan testified that she was clearly aware of the health risks. In 1978, when she was 23, her father was diagnosed with a heart condition, and his doctor told Ms. Farnan that smoking had caused the condition. She later went to nursing school, where she received further information about the health effects of smoking. By the mid-1980's, she became "convinced" that smoking causes disease; nonetheless, she "absolutely wanted to continue smoking." In contrast, Mr. Amodeo testified that he believed that it had not been scientifically proven that smoking was addictive or caused lung cancer because he "didn't believe that the government would allow cigarettes to be sold if they were unsafe."

[12] The defendants raised a number of affirmative defenses to the plaintiffs' claims, including comparative fault, which common sense dictates requires individualized proof. However, the plaintiffs assert there is no need for individualized proof on these issues, essentially claiming that all class members were affected by the

Court has already recognized that damages require individualized proof. *See Engle*, 672 So.2d at 41. Particularly in this type of smoking case where proof of damages is essential to liability, damages cannot be determined on a class-wide basis because the issue of damages requires individualized proof with regard to each smoker.[13] *See Execu-Tech Bus. Sys., Inc. v. Appleton Papers, Inc.*, 743 So.2d at 19 (class certification improper because "the issue of damages and impact in the case simply 'does not lend itself to [a mechanical calculation] but requires separate mini-trials, of an overwhelming[ly] large number of individual claims'"); *Smith v. Texaco*, 263 F.3d 394 (class members who "challenge[d] broad policies and practices that were applied in a non-standard way" could not assert uniform injuries and were required to prove punitive damages individually), *opinion withdrawn, cause dis-*

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defendants' allegedly wrongful and conspiratorial conduct in the same way.

This is simply not so as evidenced by the fact that the jury assessed different comparative fault percentages for each of the Phase 2 plaintiffs (Amodeo 25%, Farnan 20%, Della Vecchia 15%). The degree of fault the jury attributed to each defendant varied significantly among each of the three plaintiffs. Thus it is apparent that evaluation of each class members' comparative fault, will require experts on both sides to consider issues unique to each smoker, such as influences from friends and family members, exposure to information and/or propaganda regarding smoking, addiction issues, and actual knowledge of an injury or claim. It is impossible to determine such facts without mandating an individual inquiry into the specifics of each plaintiffs class members' circumstances.

[13] Proof of damages alone consumed several days of testimony with respect to each Phase 2 plaintiff. For example, on issues unique to Ms. Della Vecchia's alleged damages, the jury heard testimony from Ms. Della Vecchia herself, her husband, her two children, her sister, her brother-in-law, her family minister, and an economist. Comparable damages testimony will be required for each class member in Phase 3.

missed by, 281 F.3d 477 (5th Cir.2002); *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 147 (4th Cir.2001) (impermissible to determine damages on a class-wide basis when the governing law requires individualized proof of damages; common issues may not predominate where proof of damages is essential to liability); *Windham v. American Brands, Inc.*, 565 F.2d 59 (4th Cir. 1977) (common issues did not predominate even though the case presented a common question of violation, because there existed individualized issues of injury and damage).

Similarly, individualized choice-of-law issues demonstrate that class proceedings in the instant case are unmanageable and cannot be viewed as superior to individual litigation. *See Stone v. Compuserve Interactive Serv., Inc.*, 804 So.2d at 383 (class certification improper where, among other things, individualized choice-of-law inquiries are required); *see also Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1190 (9th Cir.2001) (certification improper because of "individualized issues and variances in state law"); *Castano v. American Tobacco Co.*, 84 F.3d at 741-44 (discussing how variations in state law can "swamp any common issues and defeat predominance").

For choice-of-law purposes, Florida law utilizes the "most significant relationship" test which provides that: "The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties." *Bishop v. Florida Specialty Paint Co.*, 389 So.2d 999, 1001 (Fla.1980) (internal citation omitted); *see also, Ryder Truck Rental, Inc. v. Rosenberger*, 699 So.2d 713, 715 (Fla. 3d DCA 1997).

Applying Florida's "most significant relationship" test to the present case, the trial court was required to take into account a variety of factors beyond the place where the cause of action arose. During pretrial proceedings, undisputed evidence showed that nearly 50% of Florida residents who are

over 50 years old-those most likely to be class members-moved to Florida after reaching age 50. Moreover, more than 65% of all current and former smokers in Florida moved here after they became regular smokers. The demographic evidence presented at trial strongly suggested many class members were not Florida residents at the time of diagnosis or manifestation.[14]

If diagnosis or manifestation did not occur during residency in Florida, each court in the Phase 3 proceedings will have to perform a full choice-of-law analysis and apply the law of the state with the most significant relationship to the parties and the occurrence. Especially in a state which has a highly transient population, choice-of-law problems present an insuperable roadblock to smokers' class actions, even where the class is limited to one state's residents. *See Reed v. Philip Morris, Inc.*, 1997 WL 538921 (D.C. Super. Ct. Aug. 18, 1997) (memorandum opinion and order).

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[14] Additionally, the circumstances of particular named plaintiffs confirmed the likelihood of other states' laws applying to the plaintiffs' claims. For example, Mr. Starr, originally a named plaintiff, started smoking in Colorado, became a regular smoker in Colorado, and suffered his alleged smoking-related problems in Colorado. Mr. Starr's only connection with Florida was that he moved here a few months before suit was filed. Unlike Florida, Colorado requires that punishable conduct be proven beyond a reasonable doubt for purposes of assessing punitive damages. *See* Colo. Rev. Stat. Ann. § 13-25-127(2). The choice-of-law determination under such circumstances is obviously crucial.

Similar choice-of-law concerns are apparent with Mr. Amodeo and Ms. Della Vecchia. The Phase 2 trial revealed that Mr. Amodeo and Ms. Della Vecchia began and continued to smoke for much of their lives in Michigan and New York, respectively. Punitive damages are not available under Michigan law. *See Jackovich v. General Adjustment Bureau, Inc.*, 119 Mich. App. 221, 326 N.W.2d 458 (1982).

As noted in *Reed v. Philip Morris, Inc.*, 1997 WL 538921 (D.C. Super. Ct. Aug. 18, 1997) which denied class certification to plaintiff smokers where the choice-of-law analysis applied was the "most significant relationship" test:

> A class member may have started smoking, learned of the dangers of smoking, tried to quit, been diagnosed with a smoking-related illness, and/or changed brands, all in different states. Accordingly, this court would have to examine the laws of virtually every state, as it is conceivable, with the transient population of the District, that each of these issues may have arisen in different states with different class members, to determine if a conflict exists and then determine which state has the most significant interest. The potential for conflicts of law mitigates against certification.

See also Smith v. Brown & Williamson, 174 F.R.D. at 95 (rejecting smokers' class limited to one state's residents in part because of manageability problems in applying the "most significant relationship" test); *Tijerina v. Philip Morris Inc.*, 1996 WL 885617, at *5; *Philip Morris v. Angeletti*, 752 A.2d at 230-33 (rejecting smokers' class limited to Maryland residents in part because of manageability problems in applying simpler "lex loci delicti" test).

The choice-of-law analysis in the present case will require examination of numerous significantly different state laws governing the different plaintiffs' claims. This fact further supports our conclusion that common questions do not predominate over individual issues, and that the superiority and the management of this trial could not be fairly and efficiently conducted as a class action.

The plaintiffs' "negative value" argument in response to the above-cited and well-established line of authority does not justify improper class certification. The plaintiffs suggest certification must be maintained at any cost because other-

wise individual plaintiffs will be left with no viable remedy, absent class certification. According to the plaintiffs, individual plaintiffs could not successfully litigate against the tobacco industry because lawyers will shun smokers' individual cases as "cost prohibitive and impractical."

This factor by itself is insufficient to overcome the hurdles of predominance and superiority, and efficient and fair management of a trial, which are required by our class action rules. The serious problems this type of class action suffers in terms of both efficiency and fairness cannot be resolved by characterizing individual smokers' claims as having a "negative value." To do so is not only intellectually improper, but also clearly refuted by the Phase 2 verdict, where the jury awarded $12 million dollars in compensatory damages to just three smokers on their individual claims.[15] he plaintiffs' "negative value" claim is baseless and does not "justify the headlong plunge into an unmanageable and interminable litigation process that, at the outset, shows little promise for fairness to either [plaintiffs] or the defendant manufacturers." *Barreras Ruiz v. American Tobacco Co.*, 180 F.R.D. 194, 199 (D.P.R.1998); *accord Castano*, 84 F.3d at 748; *In re LifeUSA Holding, Inc.*, 242 F.3d 136, 148 n.13 (3d Cir.2001).

In sum, particularly with regard to the determination of causation and damages, and where claims could require application of the laws of numerous other states, it is inescapable that the predominance and superiority requirements for class action have not been met. As succinctly stated by one commentator:

> [I]f the main issues in a case require the separate adjudication of each class member's individual claim or defense, a Rule 23(b)(3) action would be inappropriate.... Moreover, when individual rather

[15] Ironically, in support of a separate argument, the plaintiffs' brief boasts an award of $79.5 million dollars in punitive damages was entered in another case for "a single deceased smoker."

> than common issues predominate, the economy and efficiency of class action treatment are lost and the need for judicial supervision and the risk of confusion are magnified.

7a Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1778 at 535-39 (2d ed.1986) (footnotes omitted).

As now demonstrated by the two-year trial, even though there is a common nucleus of facts concerning the defendants' conduct, this case presents a multitude of individualized issues which make it particularly unsuitable for class treatment. *See State Farm Mut. Auto. Ins. Co. v. Kendrick*, 822 So.2d 516, 518 (Fla. 3d DCA 2002); *Humana, Inc. v. Castillo*, 728 So.2d 261, 265-66 (Fla. 2d DCA 1999); *see also In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020 (7th Cir.2002) (reversing certification; differences in state law cannot be overridden based upon a quest to clear the queue in court); *Stirman v. Exxon Corp.*, 280 F.3d 554, 564 (5th Cir.2002) (reversing certification because district court failed to take into account significant variations in state law that defeat predominance). A class action is not superior to alternative means of adjudication, and the record does not support the requisite findings under Florida Rule of Civil Procedure, Rule 1.220.

The trial record and recent case law conclusively establish that Florida's class action rules, substantive tort law, and state and federal guarantees of due process and a fair trial, require class decertification. In accordance with the numerous cases which have found class certification improper in virtually identical smokers' claims cases, we find the class must be decertified. Accordingly, the certification of the class is reversed, with instructions to decertify and to allow all class members whose claims have not yet been tried to proceed individually.

III. Punitive Damages: "The Cart Before Horse"

The order below must also be reversed because the trial court erred in awarding and ordering payment of class-wide punitive damages without the necessary findings of liability and compensatory damages. The order violates well-established Florida precedent by: a) improperly requiring the defendants to pay punitive damages for theoretical injuries to hundreds of thousands of class members, without a determination that defendants are liable for such injuries; b) precluding the constitutionally required comparison of punitive damages and compensatory damages; and c) eliminating the jury's discretion to assess punitive damages based upon the individual class members' varying circumstances.

In Phase 1, the jury answered certain general questions about the defendants' products and conduct. The questions related to some, but not all of the elements of each legal theory alleged. The jury also found that unspecified conduct by the defendants "rose to a level that would permit a potential award or entitlement to punitive damages."

The jury did not determine whether defendants were liable to anyone. Essential elements of liability, such as reliance and proximate cause, were never tried in Phase 1. Instead, they were left to be tried separately for each class member in Phase 2 or Phase 3.[16] Yet, regardless of how many of the assumed 700,000 or more class members actually proceed to try their claims in Phase 3 and ultimately es-

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[16] The only determinations of liability that have been made so far in this case were made in Phase 2, and those determinations have been made with respect to only three individuals-Mr. Amodeo, Ms. Della Vecchia, and Ms. Farnan. Beyond these three individuals, the defendants have not been found liable to any class member on any legal theory, much less on any theory for which punitive damages are available in this case, *i.e.*, fraud, conspiracy to defraud, and emotional distress.

tablish liability and compensatory damages, the defendants must pay $145 billion dollars in punitive damages.

Florida law requires that a defendant be found liable before any punishment is imposed. Accordingly, "[w]here actual damage is an element of the underlying cause of action, an award of compensatory damages must be a prerequisite to an award of punitive damages." *Ault v. Lohr*, 538 So.2d 454, 457 (Fla.1989) (Ehrlich, C.J. concurring); *see also W.R. Grace & Co. v. Waters*, 638 So.2d 502 (Fla.1994) (punitive damages in bifurcated trial may not be determined until after the jury has determined liability for compensatory damages and the amount of compensatory damages); *Oliveira v. Ilion Taxi Aero Ltda*, 830 So.2d 241 (Fla. 4th DCA 2002) (punitive damages award reversed because there was no finding of liability). Federal due process law incorporates the same principle. *See Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 418 (5th Cir.1998) (punitive damages "must be determined after proof of liability to individual plaintiffs"); *Taber Partners I v. Merit Builders, Inc.*, 121 F.3d 695 (1st Cir.1997) (unpublished table decision) (a "firmly established legal rule is that a finding of liability must precede any finding of damages").[17]

Without this prior assessment it is impossible to determine whether punitive damages bear a "reasonable" relationship to the actual harm inflicted on the plaintiff, as required by Florida and federal law. *See* § 768.74(5)(d), Fla. Stat. (1997); *Bankers Multiple Line Ins. Co. v. Farish*, 464 So.2d 530, 533 (Fla.1985); *Langmead v. Admiral Cruises, Inc.*, 696

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[17] *See also Brian H. Barr, Engle v. R.J. Reynolds: The Improper Assessment of Punitive Damages for an Entire Class of Injured Smokers*, 28 Fla. St. U.L.Rev. 787, 824 (2001) (the Engle trial plan violated "both Florida law and the [defendants'] due process rights" by awarding "punitive damages to an entire class of injured Florida smokers prior to any findings of individual liability and individual harm for each class member").

So.2d 1189, 1193-94 (Fla. 3d DCA 1997)(under Florida and federal due process laws, a punitive award must be proportionate to the "actual harm inflicted on the plaintiff"); *see also Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 441-42, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001) (courts must examine "the ratio between the size of the award of punitive damages and the harm caused"); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 580, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) (due process requires consideration of the "ratio" of punitive damages "to the actual harm inflicted on the plaintiff").

Establishment of this reasonable relationship requires a prior determination of the compensatory damages caused by the alleged misconduct. *See* Op. Att'y Gen. Fla., 2000 WL 329587 (Fla.A.G. 2000)("[i]n the absence of any determination of the extent of compensatory damages, the court lacks a standard by which it can judge whether an assessment of punitive damages is reasonable or is grossly excessive"). Without this prior determination, any comparison between a punitive award and the "actual harm" is impossible.

For this reason, federal and other state courts have repeatedly held that compensatory damages must be tried before punitive damages.[18] *See Southwestern Ref. Co. v.*

[18] For example, in *Southwestern Ref. Co. v. Bernal*, 22 S.W.3d 425 (Tex. 2000), the Texas Supreme Court struck down a trial plan strikingly similar to the one presented here. The plan in Bernal provided that the jury would determine in Phase I whether defendants were grossly negligent; if it determined that they were, the jury would proceed in Phase II to assess an amount of punitive damages for the entire class. Individual trials would follow in Phase III. The intermediate appellate court largely endorsed the plan but held that the jury could not assess punitive damages without first making some findings of individual liability; it therefore modified the plan to require proof of compensatory damages by nineteen class representatives out of a putative class of 904 individuals before the assessment of class-wide punitive damages.

Bernal, 22 S.W.3d 425; *see also, Allison*, 151 F.3d at 418 (punitive damages in a multi-stage class action "must be determined after proof of liability to individual plaintiffs"); *Smith v. Brown & Williamson Tobacco Corp.*, 174 F.R.D. 90, 97 (W.D. Mo.1997) (rejecting a trial plan that required the jury to assess class-wide punitive damages before assessing compensatory damages); *Philip Morris, Inc. v. Angeletti*, 358 Md. 689, 752 A.2d 200, 247 (2000) ("Maryland law prohibit[s] an award of punitive damages made without regard to the actual compensatory damages to be awarded"); *cf. EEOC v. W & O, Inc.*, 213 F.3d 600, 615 (11th Cir. 2000) ("Before comparing the punitive damages to the actual damages, we must first determine what the 'actual damages' were").

In an apparent effort to sidestep this well-established authority, the plaintiffs argue *Ault v. Lohr*, 538 So.2d at 454, and *W.R. Grace & Co. v. Waters*, 638 So.2d at 502, have been complied with, contending that the Phase 1 verdict constitutes a finding that defendants "breached a duty." According to the plaintiffs, that finding alone is a sufficient predicate for a class-wide punitive award-even though it is not a finding of liability. The plaintiffs have misread Ault.

In *Ault*, the jury found the defendant was liable for civil assault and battery, not just that he had "breached a duty." The jury then awarded punitive damages without awarding compensatory damages. The Florida Supreme Court held that even in the absence of compensatory damages, the puni-

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The Texas Supreme Court reversed, finding that the modified trial plan was just as flawed as the original. It held that the modified trial plan improperly "allowed the jury [to] decide punitive damages for the entire class without knowing the severity of the offense or the extent of compensatory damages, if any, for each of the 885 plaintiffs." *Southwestern Ref. Co. v. Bernal*, 22 S.W.3d at 433.

tive award was proper because it rested on the jury's "express finding of liability." *Ault v. Lohr*, 538 So.2d at 456.[19]

Plaintiffs' "breach of duty" theory ignores the essential finding of liability in *Ault*. A punitive award is proper only if the plaintiff proves every element of liability on the underlying cause of action. *See Ault v. Lohr*, 538 So.2d at 457 (Ehrlich, C.J., concurring).[20] See also, *Nat'l Aircraft Services, Inc. v. Aeroserv Int'l, Inc.*, 544 So.2d 1063, 1065 (Fla. 3d DCA 1989)(a fraud plaintiff who fails to obtain compensatory damages has not proved all the elements of fraud and thus may not obtain punitive damages).

Here, the plaintiffs sought punitive damages for fraud, concealment, and "intentional infliction of emotional dis-

[19] The plaintiffs in *Ault* were escaped inmates who, when recaptured, alleged a police dog was ordered to "bite and scratch them" while they were handcuffed. The plaintiffs sued for assault and battery, and one of them was awarded $0 in compensatory damages and $5000 in punitive damages. The Florida Supreme Court noted the general rule that "exemplary or punitive damages are not recoverable in an action of tort unless actual damages are shown." *Ault v. Lohr*, 538 So.2d at 455 (citations omitted). It then clarified its prior decision in *McLain v. Pensacola Coach Corp.*, 152 Fla. 876, 13 So.2d 221 (1943), and held that a jury finding of liability is the equivalent of finding nominal damages. Thus, a jury may assess punitive damages even if the amount of the actual damages is found to be $0. *Ault v. Lohr*, 538 So.2d at 456.

[20] The torts of assault and battery which were alleged in Ault do not require proof of actual injury or compensatory damages as elements of liability. *See, e.g., Paul v. Holbrook*, 696 So.2d 1311, 1312 (Fla. 5th DCA 1997) (battery); *Lay v. Kremer*, 411 So.2d 1347, 1349 (Fla. 1st DCA 1982) (assault); see also *Ault*, 538 So.2d at 457 (Ehrlich, C.J., concurring) (assault and battery "do not require proof of actual damage"). In other cases, however, where the alleged torts do require actual injury and compensatory damages, those (and all other) elements of liability must be established before punitive damages may be awarded. See *Ault*, 538 So.2d at 457 (Ehrlich, C.J., concurring).

tress." Liability for each of those causes of action requires much more than just a "breach of duty." Each requires actual injury, compensatory damages, and other liability elements as well.[21] Thus regardless of whether the Phase 1 verdict constituted a finding that defendants "breached a duty," such a finding is an insufficient predicate for the punitive award because it fails to establish actual injury and compensatory damages, plus other elements of liability, as to any of the individual class members.

The plaintiffs' alternatively argue Ault has been satisfied claiming the Phase 1 verdict actually did establish the defendants' "liability" to each class member. This argument is similarly meritless. The mere finding that smoking causes certain diseases does not establish the causation elements of liability.

Specific medical causation and legal causation, along with other elements of liability, must be established on an individualized basis. As noted by one court, "a finding of 'general causation' would do little to advance this [smokers class] litigation. Liability will not turn on whether cigarettes are generally capable of causing disease; liability will depend

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[21] For example, fraud and concealment require reliance, proximate causation, actual injury, and compensatory damages. *See, e.g., Lopez-Infante v. Union Cent. Life Ins. Co.*, 809 So.2d 13, 15 (Fla. 3d DCA 2002); *Jones v. Gen. Motors Corp.*, 24 F.Supp.2d 1335, 1339 (M.D.Fla.1998). Similarly, an "emotional distress" claim requires not only actual injury and compensatory damages, but also a showing of proximate causation and proof that the particular plaintiff suffered severe emotional distress. *See, e.g., De La Campa v. Grifols America, Inc.*, 819 So.2d 940, 943 (Fla. 3d DCA 2002); *Dominguez v. Equitable Life Assurance Soc'y*, 438 So.2d 58, 59 (Fla. 3d DCA 1983); *Stockett v. Tolin*, 791 F.Supp. 1536, 1556 (S.D. Fla.1992). Moreover, affirmative defenses must be adjudicated before liability can be established. *See Hospital Correspondence Corp. v. McRae*, 682 So.2d 1177 (Fla. 5th DCA 1996); *Kiser v. Jones*, 488 So.2d 554 (Fla. 3d DCA 1986).

upon whether cigarettes caused a particular plaintiff's disease." *See Smith v. Brown & Williamson Tobacco Corp.*, 174 F.R.D. at 96. No findings of specific medical and legal causation were made in the plaintiff-less Phase 1 trial.[22]

Finally, the plaintiffs attempt to satisfy Ault by claiming the Phase 2 verdict as to the three individual class representatives established the defendants' liability to all class members, and hence awarding punitive damages to the entire class is appropriate. This argument is also fundamentally flawed.

The defendants are entitled to a jury determination, on an individualized basis, as to whether and to what extent each particular class member is entitled to receive punitive damages. One class member's circumstances cannot serve as a proxy for another's.[23] *See, e.g., In re Copley Pharm., Inc.*,

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[22] *See supra*, page 445.

[23] This has been established during the Phase 2 trial of the individual plaintiffs. As discussed earlier, each of the three plaintiffs had uniquely different circumstances which directly impacted issues of liability and damages. This demonstrates their claims were inherently individualized.

Significantly, none of the three plaintiffs presented a proper claim within the class action. The jury expressly found that plaintiff Amodeo's claims were time-barred. According to the jury, Amodeo knew or should have known, more than four years before the suit was filed, that he was addicted to smoking and that his cancer could have been caused by smoking. Amodeo's knowledge thus barred his claims under the four-year statute of limitations. *See* § 95.11(3), Fla. Stat. (2001).

However, the trial court ruled that the statute did not bar Amodeo's fraud and conspiracy claims and barred only his other claims (strict liability, implied warranty, express warranty, negligence, and "emotional distress"), citing to *Pulmosan Safety Equip. Corp. v. Barnes*, 752 So.2d 556 (Fla.2000). This was clearly error.

First, Amodeo's knowledge barred all of his claims equally, including his fraud claim and his derivative conspiracy claim. *See* § 95.031(2)(a), Fla. Stat.(2001)("an action for fraud . . . must be

begun within [the four year period] . . . running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence"); *Korman v. Iglesias*, 825 F.Supp. 1010, 1015 (S.D. Fla. 1993)(facts giving rise to a fraud claim are discovered when plaintiff has notice of facts different from what was allegedly represented).

Amodeo asserted that he had been defrauded into believing that cigarettes were safe and not addictive. According to the jury's verdict, however, he discovered the opposite more than four years before the present case was filed. His fraud and conspiracy claims were therefore time barred, just like his other claims.

Second, *Pulmosan Safety Equip. Corp. v. Barnes*, 752 So.2d at 556 (Fla. 2000), does not establish an exception to the statute of limitations bar in the case of continuing fraud. The trial court's reliance on *Pulmosan* is misplaced. *Pulmosan* involved the statute of repose-the relevant provision here is the statute of limitations. Moreover, *Pulmosan* did not address fraud claims, and with respect to the different type of claims involved in *Pulmosan*, the Supreme Court merely held that it was unconstitutional for a statutory time bar to begin running until the injury was discovered. No similar issue was presented here, given the jury's finding that discovery took place more than four years before this suit was filed. *See Carter v. Brown & Williamson Tobacco Corp.*, 778 So.2d 932 (Fla. 2000)(statute of limitations begins to run when plaintiff discovers a smoking-related injury), *cert. denied*, 533 U.S. 950, 121 S.Ct. 2593, 150 L.Ed.2d 751 (2001); *Korman*, 825 F.Supp. at 1015. The trial court erred in refusing to apply the jury's findings to Amodeo's fraud and conspiracy claims. Judgment should have been entered for the defendants as to all of Amodeo's claims.

Similarly, judgment should have been entered in favor of the defendants as to individual plaintiffs Farnan and Della Vecchia because their claims did not accrue until years after the cut-off date for class membership. Class membership is a prerequisite to participating in and receiving the benefits of a class action trial. *See Garrish v. United Auto., Aerospace & Agric. Workers of America*, 149 F.Supp.2d 326, 331 (E.D.Mich. 2001)(class membership must be defined to allow the court "to determine who would be entitled to relief, who would be bound by a judgment, and who is entitled

161 F.R.D. 456, 467 (D.Wyo.1995)(rejecting proposal to try punitive liability as a class-wide issue because punitive damages are measured, in part, by the outrageousness of the conduct relative to a particular plaintiff); *see also, Reap v. Cont'l Cas. Co.*, 199 F.R.D. 536, 549 (D.N.J.2001)(denying class certification because, among other things, calculating compensatory and punitive damages would be an individualized task); *Adams v. Henderson*, 197 F.R.D. 162, 172 (D.Md.2000)(denying class certification due to, among other things, the fact that individualized damages inquiries would inevitably by required for the compensatory and punitive damages claims).

This Court specifically recognized in its 1996 mandate that "the issue of damages" in this case must "be tried as to each class member." *Engle*, 672 So.2d at 41. Our ruling made no distinction between compensatory and punitive damages.

The award below directly violates this Court's mandate because it allows the trial of three individuals' claims to establish entitlement to punitive damages with respect to the entire class. Our mandate was in accord with settled Florida law which provides that, "awarding punitive damages along

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to notice of the action"). The date of class certification sets the cut-off date for class membership. *See Davis v. Ball Mem'l Hosp. Ass'n*, 753 F.2d 1410, 1420 (7th Cir.1985)(referring to "the time the statewide class was certified" as the relevant cut-off); *Walker v. Haynes*, 659 F.2d 46, 47 (5th Cir.1981).

The class in this case was certified on October 31, 1994, and the order specifically referred to smokers "who have suffered, presently suffer or who have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine." By its terms, the class definition includes only those smokers who developed a disease by October 31, 1994. Since Farnan was diagnosed in April 1996, and Della Vecchia was diagnosed in February 1997, they are clearly excluded from the class and the judgment in their favor must be reversed.

with compensatory damages [is] discretionary [with the jury], even if the elements authorizing punitive damages [are] present." *Bankers Multiple Line Ins.*, 464 So.2d at 532; *see also, Owens-Corning Fiberglas Corp. v. Ballard*, 749 So.2d 483, 486-87 (Fla.1999); *Wackenhut Corp. v. Canty*, 359 So.2d 430, 436 (Fla.1978); *Humana Health Ins. Co. v. Chipps*, 802 So.2d 492 (Fla. 4th DCA 2001); 1 *J. Kircher & C. Wiseman, Punitive Damages: Law & Practice* § 5: 23, at 5-152 (2d ed.2000) ("the jury, in its discretion, may withhold [punitive] damages in the face of overwhelming proof of the requisite egregious conduct on the part of the defendant").

Yet the plaintiffs suggest that it was proper for the trial court to "extrapolate" the class representatives' damages to the rest of the class during the punitive damages phase of the trial. Extrapolation is not theoretically permissible in this case because of the absence of essential information concerning actual class size, class composition, and the amounts of compensatory damages ultimately recoverable by class members.[24] Essentially, the compensatory damages awarded to the three Phase 2 plaintiffs proved nothing about the amounts of compensatory damages potentially recoverable by the hundreds of thousands of class members whose claims have not yet been tried. *See Smith v. Texaco*, 263 F.3d at 410 (where injuries are not uniform among class members, "an individualized inquiry is necessary" as to punitive damages);

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[24] Moreover, the three class representatives were hand-picked by plaintiffs' counsel and cannot be viewed as a statistically significant nor representative "sample." No statistical authority would condone an extrapolation of findings from three handpicked individuals to a population of 700,000. *See, e.g., In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1019 (5th Cir.1997)("the sample must be a randomly selected one of sufficient size so as to achieve statistical significance"); *In re Dow Corning Corp.* 211 B.R. 545, 572 n. 27 (Bankr.E.D.Mich.1997)(the sample "must be selected at random and must be representative of the group"); *Manual for Complex Litigation* § 33.27 (3d ed.1995).

Cimino v. Raymark Indus., Inc., 151 F.3d 297, 319 (5th Cir.1998); *In re Fibreboard Corp.*, 893 F.2d 706, 710-12 (5th Cir.1990); *In re Tetracycline Cases*, 107 F.R.D. 719, 734-35 (W.D.Mo.1985).[25]

The plaintiffs' arguments in this regard contradict settled Florida law and basic concepts of due process. A claim for punitive damages is not a separate and distinct cause of action; rather it is auxiliary to, and dependent upon, the existence of an underlying claim. As such, any award of punitive damages can only be entered after awarding damages in conjunction with an underlying and successful claim for actual damages. *See State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003)(punitive award must be limited to unlawful conduct that has a nexus to the "specific harm suffered by the plaintiff"; punitive award must be based upon facts and circum-

[25] In *Agency for Health Care Admin. v. Assoc. Indust. of Florida, Inc.*, 678 So.2d 1239 (Fla.1996), the Florida Supreme Court rejected the kind of irrebuttable presumption of uniform, aggregate liability suggested by the plaintiffs "extrapolation" theory as illogical and violative of the Florida Constitution. The case involved a statute that allowed the state to recoup Medicaid payments from the tobacco industry "on behalf of an entire class" of unidentified Medicaid recipients. The statute was found to be unconstitutional because it deprived tobacco companies of their rights under Florida law to defend against each claim. The statute effectively created an irrebuttable presumption that every Medicaid payment was proper and resulted from smoking. This was held improper.

Similarly, "extrapolation" in the present case creates an irrebuttable presumption that 700,000 or more unidentified individuals suffered injuries comparable to those suffered by the three class representatives. The presumption is irrebuttable because the $145 billion award will remain fixed, even if Phase 3 reveals that the vast majority of class members did not suffer such injuries. Such an irrebuttable presumption would clearly violate the law applied in *Agency for Health Care Administration*.

stances of the defendant's conduct and "the harm to the plaintiff"; courts must ensure punitive award is "proportionate to the amount of harm to the plaintiff").[26]

The trial plan in the instant case required the defendants to pay punitive damages for supposed injuries to thousands of class members without the necessary prerequisite findings of liability and compensatory damages. Since the class-wide punitive damages award improperly places the proverbial "cart before the horse," it must be reversed.

IV. Punitive Award Excessive Under State and Federal Law

It is well established that punitive damages may not be assessed in an amount which will financially destroy or bankrupt a defendant. *See Arab Termite & Pest Control of Florida, Inc. v. Jenkins*, 409 So.2d 1039, 1043 (Fla.1982); *Lipsig v. Ramlawi*, 760 So.2d 170, 188 (Fla. 3d DCA 2000), *review denied*, 786 So.2d 579 (Fla.2001); *Brooks v. Rios*, 707 So.2d 374, 375 (Fla. 3d DCA 1998); *Hockensmith v. Waxler*, 524 So.2d 714, 715 (Fla. 2d DCA 1988).[27] And yet, that is precisely what occurred in the instant case.

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[26] In *State Farm*, the United States Supreme court reversed the Utah Supreme Court's decision upholding a punitive award of $145 million where the compensatory award was $1 million. The Supreme Court reiterated that punitive damages must be reasonable and proportionate to the harm suffered by the plaintiff. The Court cautioned: "Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of [a] reprehensibility analysis." *State Farm*, 123 S.Ct. at 1516. In sum, punitive damages cannot be assessed in the aggregate. Punitive damages must be assessed on an individual basis, in relation to each class member's compensatory damages, if any.

[27] Federal due process also prohibits "excessive" punitive awards. *See, e.g., Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. at 424, 121 S.Ct. 1678; *BMW of North America, Inc. v. Gore*, 517 U.S. at 562, 116 S.Ct. 1589; *TXO Prod. Corp. v. Alliance Re-*

This trial produced the largest punitive damage verdict in American legal history. As acknowledged by even the plaintiffs' purported experts, the $145 billion punitive award will extract all value from the defendants and put them out of business, in violation of established Florida law that prohibits bankrupting punitive awards.

The defendants established that their combined net worth was no more than $8.3 billion.[28] Their collective capacity to

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sources Corp., 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993).

[28] Florida courts routinely use net worth to determine whether a punitive award is bankrupting or excessive. *See Lipsig v. Ramlawi*, 760 So.2d at 189 (punitive award held improper because it was 1.12 times defendant's net worth and thus would result in defendant's "financial demise"); *Turner v. Fitzsimmons*, 673 So.2d 532, 536 (Fla. 1st DCA 1996)(net worth evidence critical to determination of excessiveness of punitive award); *Hockensmith v. Waxler*, 524 So.2d at 715 (net worth evidence used by the court to determine punitive award was excessive); *see also Brooks v. Rios*, 707 So.2d at 376 (evidence of net worth must be presented to preserve the defendant's right to argue excessiveness of award on appeal). Here, the defendants properly established their net worth and ability to pay through the testimony of each manufacturer's CEO and through the introduction of the defendants' audited financial statements. *See Rety v. Green*, 546 So.2d 410 (Fla. 3d DCA 1989)(president's testimony plus audited financial statements admissible as evidence of financial worth); *Salvage & Surplus, Inc. v. Weintraub*, 131 So.2d 515, 516 (Fla. 3d DCA 1961) (knowledgeable corporate officer can testify as to value); *see also Witchell v. Londono*, 707 So.2d 796, 799 n.2 (Fla. 1st DCA 1998)(corporate officer with knowledge of relevant values is qualified to testify); *Mercury Marine Div. of Brunswick Corp. v. Boat Town U.S.A., Inc.*, 444 So.2d 88, 90 (Fla. 4th DCA 1984)(corporate officer's testimony established loss of business value); *Alexander v. Alterman Transp. Lines, Inc.*, 387 So.2d 422, 424 (Fla. 1st DCA 1980)(financial statements provided sufficient evidence of financial worth upon which to base punitive award).

pay any punitive award while still remaining in business was far less. The $145 billion verdict is roughly 18 times the defendants' proven net worth.[29]

There is no precedential authority for such an award. No Florida decision endorses even a remotely comparable award. The largest reported awards involved only a fraction of a defendant's net worth. *See Wackenhut Corp. v. Canty*, 359 So.2d 430 (Fla.1978) (2%); *Bould v. Touchette*, 349 So.2d 1181 (Fla.1977) (6.2%); *Zambrano v. Devanesan*, 484 So.2d 603 (Fla. 4th DCA 1986) (14.29%); *Smith v. Telophase Nat'l*

Significantly, the plaintiffs' "experts" (who were neither CPA's nor accounting experts), never refuted the defendants' audited financial statements. Net worth and ability to pay can be determined only through the objective application of generally accepted accounting principles. *See, e.g., Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1200 n.3 (11th Cir.2001); *Southwest Whey, Inc. v. Nutrition 101, Inc.*, 188 F.Supp.2d 986, 989 (C.D.Ill.2002); *Wilson v. Gillis Adver. Co.*, 145 F.R.D. 578, 582 (N.D.Ala.1993). The defendants clearly met their burden of proving net worth and ability to pay through the objective evidence presented in the form of their audited financial statements.

[29] Similarly, each defendant-specific award is a multiple of that defendant's individual net worth, as proven at trial. The $73.96 billion dollar award against Philip Morris was roughly twelve times its net worth of $6.4 billion. The $17.59 billion dollar award against Brown & Williamson was roughly twenty times its net worth of $894 million. The $16.25 billion dollar award against Lorillard was roughly eighteen times its net worth of $921 million. The $790 million dollar award against Liggett was twenty-three times its net worth of $33.8 million.

Furthermore, the jury awarded $36.28 billion dollars against Reynolds, even though plaintiffs' "expert" admitted that Reynolds had a negative tangible net worth after the exclusion of good will, which is not a saleable asset. Reynolds also showed that its 1999 income from continuing operations nationwide was only $195 million. Even after assigning a zero net worth to Reynolds, defendants showed a combined net worth of no more than $8.3 billion.

Cremation Soc'y, Inc., 471 So.2d 163 (Fla. 2d DCA 1985) (20%); *see also People ex rel. Dep't of Transp. v. Grocers Wholesale Co.*, 214 Cal.App.3d 498, 262 Cal.Rptr. 689, 699-700 (1989) (noting that while 10% is the maximum for punitive damage awards, significantly lower percentages are generally the norm). No case has awarded punitive damages based upon multiples of net worth, as was done in the present case.

A defendant's financial capacity is a crucial factor in determining the appropriateness of a punitive damages award. The amount awarded should be large enough to provide retribution and deterrence, but cannot be so great as to result in bankruptcy.[30] Punitive damages are imposed to benefit society's interests. Because society has an interest in protecting future claimants' demands, the importance of the relationship between the amount of punitive damages and the ability of the defendant to pay the award cannot be ignored.

The excessive award in the present case will frustrate the societal interest in protecting all injured claimants' rights to at least recover compensatory damages for their smoking re-

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[30] Moreover. even if an award is not bankrupting, it must be reasonable and proportionate to the harm suffered and cannot be justified solely upon the wealth of the defendant. *See State Farm*, 123 S.Ct. at 1525 ("The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award."). As noted by the United States Supreme Court in *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432, 114 S.Ct. 2331, 2341, 129 L.Ed.2d 336 (1994): "This Court has not hesitated to find proceedings violative of due process where a party has been deprived of a well-established common-law protection against arbitrary and inaccurate adjudication. *See, e.g., Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749. Punitive damages pose an acute danger of arbitrary deprivation of property, since jury instructions typically leave the jury with wide discretion in choosing amounts and since evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses."

lated injuries. Smokers with viable compensable claims will have no remedy if the bankrupting punitive award in the instant case is upheld.

For the several reasons stated above, we find the trial court abused its discretion when it denied the defendants' motion for either a remittitur or a new trial. This unprecedented punitive damages award is excessive as a matter of law, and thus does not promote a valid societal interest. See *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003)(punitive award of $145 million on a $1 million compensatory judgment held excessive; award exceeding single-digit ratio between punitive and compensatory damages presumptively violates due process.)[31] As discussed further below, the bankrupting punitive award resulted from inflamed juror passion and prejudice which blinded the jury from properly considering the purpose of the award in relation to the defendants' financial capacity.

V. Inflammatory Arguments Mandate Reversal

Plaintiffs' counsel's improper race-based appeals for nullification caused irreparable prejudice and require reversal. It is obvious that the "runaway" jury award was largely the result of numerous improper comments by plaintiffs' counsel directing the jury to disregard limitations on punitive damages. The trial was book-ended with prejudicial attorney

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[31] As explained recently by the United States Supreme Court, an excessive award of punitive damages does not further a legitimate state purpose and constitutes an arbitrary deprivation of property in violation of the Due Process Clause of the Fourteenth Amendment. *See State Farm*, 123 S.Ct. at 1519-20. Stressing the importance of de novo appellate review to prevent excessive jury awards resulting from arbitrary passion or prejudice, the Court noted: "Exacting appellate review ensures that an award of punitive damages is based upon an 'application of law, rather than a decisionmaker's caprice.'" *State Farm*, 123 S.Ct. at 1520-21 (citations omitted).

misconduct which incited the jury to disregard the law because the defendants are tobacco companies.[32]

This was accomplished in two stages. First, by inflaming the jury with racial pandering and pleas for nullification of the law to secure entitlement to punitive damages. And second, by removing responsibility from the jury for the size of the award, through arguing the award would be subject to appellate review and that it would not be paid out in a lump sum, but rather through a payout scheme.

Plaintiffs' counsel began making racially-charged arguments on the first day of trial. This was done before a jury where four of the six venire members were African-American. In opening statements during the Phase 1 trial, plaintiffs' counsel told the jury that the defendants "study races" and "divide the American consumer up into groups," including "white" and "black."[33] Plaintiffs' counsel then ex-

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[32] The United States Supreme Court has recently noted that the danger of a punitive award resulting in an arbitrary deprivation of property is heightened where a jury is presented with evidence of net worth or evidence that has little bearing as to the amount of punitive damages that should be awarded. *See State Farm*, 123 S.Ct. at 1519-20. The Court in *State Farm* cautioned that "[v]ague instructions, or those that merely inform the jury to avoid 'passion or prejudice,' do little to aid the decisionmaker in its task of assigning the appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory." *State Farm*, 123 S.Ct. at 1520 (citations omitted).

[33] Later counsel presented an expert who testified that defendants' advertising had "perpetuated" the "racial segregation" of America through the 1970's and 1980's. In cross-examining an historian called by the defense, plaintiffs' counsel suggested that the witness admired Vice President John Calhoun, a defender of slavery before the Civil War, because the witness's resume included studies of Calhoun. Plaintiffs' counsel used this as an excuse to make the following speech about slavery:

plicitly tied these racial references to appeals for jury nullification of the law during closing argument. He set the stage by telling the jury: "And let's tell the truth about the law, before we all get teary-eyed about the law. Historically, the law has been used as an instrument of oppression and exploitation." Plaintiffs' counsel then juxtaposed defendants' conduct with genocide and slavery.[34] Although the trial court

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> [Y]ou know, according to people like Calhoun, there were two sides to that story. I mean, one side was: let's abolish slavery, and let's give people their freedom. And the other side was espoused by an intellectual such as Calhoun: No, slavery is okay. It's good. We need it. It's good for the South, good for the economy. Correct? There were two sides to that issue, according to people like Calhoun.

Over objection, plaintiffs' counsel continued to refer to defenders of slavery and to the poll tax, Strom Thurmond, and similar irrelevancies. The court acknowledged the comments were improper and gave the jury the following patently ineffective "curative" instruction: "We've gone into the past as far as this subject is concerned, and there's a lot about the discussion that we've had up to this point that has no relevancy or materiality [to] the issues in the trial. We understand that. Some sensitive issues have been raised back in the 1800s that [have] nothing to do with this case. So we'll proceed with that concept in mind. Go ahead."

Plaintiffs' counsel continued to engage in the same misconduct immediately thereafter. Nevertheless, the court did nothing more than sustain defendants' further objection, out of the hearing of the jury.

[34] The record reflects the following exchange:

> [Plaintiffs' counsel] "You want to be fair, and you say: Right, there's two sides to every question. What's the other side to the holocaust? What is it?
>
> [Defense counsel]: Objection your honor.

sustained a defense objection, plaintiffs' counsel proceeded to tell the jury that, like slavery and the Holocaust, there was just one "side" to whether the defendants should continue to sell cigarettes:

> If you admit that you sell a product that causes cancer-I admit my product causes cancer-and if you also admit it's also addictive, get out of the business. That's the only moral, ethical, religious, decent judgment to make... If you sell a product which causes cancer and which is addictive, stop selling it. Stop selling it, because you know it's doing unbelievable harm to your fellow Americans.

The defendants' objection was overruled, allowing plaintiffs' counsel to conclude: "[The defendants say] [i]t's a legal product. It's a legal product. Legal don't make it right. Legal don't make it right."

For more than sixty years, federal statutes have protected the right to sell cigarettes, even though Congress has recognized that cigarettes are dangerous. Federal law preempts claims that selling cigarettes is tortious or otherwise improper. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001).[35] A defendant cannot be punished for lawful conduct. *See State Farm*, 123 S.Ct. at 1522.

> [Plaintiffs' counsel, ignoring the objection]: What is the other side to slavery?

[35] In *FDA v. Brown & Williamson*, 529 U.S. at 137, 120 S.Ct. 1291, the Supreme Court noted that Congress has foreclosed the removal of tobacco products from the market since at least 1938. Moreover, during the period from 1965 to 1992-a period in which "the adverse health consequences of tobacco use were well known, as were nicotine's pharmacological effects"-Congress passed various statutes that "directly addressed the problem of tobacco and health," while continuing to uphold the legality of selling ciga-

Because the sale of cigarettes is subject to federal regulation, attempts to impose contradictory requirements or prohibitions under state law are subject to at least implied preemption. *See, e.g., Insolia*, 128 F.Supp.2d at 1225 ("allowing tort actions against cigarette manufacturers and sellers for the allegedly negligent act of continuing to make and sell cigarettes would interfere with Congress's policy in favor of keeping cigarettes on the market"); *see also, Geier v. American Honda Motor Co.*, 529 U.S. 861, 865, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000) (federal regulation of car manufacturers preempted state-law tort claims); *cf., Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 350, 121 S.Ct. 1012, 148 L.Ed.2d 854 (2001) (state-law claims based on alleged misrepresentations to a federal regulatory agency were preempted).

Yet counsel repeatedly urged the jury to fight what he called "unjust laws" citing the civil disobedience of Martin Luther King and Rosa Parks.[36] Counsel compared the defen-

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rettes. *FDA v. Brown & Williamson*, 529 U.S. at 137-38, 120 S.Ct. 1291. *See Lorillard v. Reilly*, 121 S.Ct. at 2426.

[36] The record reflects counsel stated: "Let's discuss the concept of legal in the context of America. I noticed in last week's newspaper Rosa Parks, who is 86 years old, got the Congressional Gold Medal because in 1955-[objection]-she refused."

The defendants interrupted with an objection, which the court sustained. However, a short time later plaintiffs' counsel resumed what he had started-an appeal to civil disobedience, by commenting: "We look back in history. The whole civil rights movement of the '60s was fighting against unjust laws. Dr. King was arrested in the '60s."

Although the court sustained defendants' objection at this point, counsel ignored the ruling and went on: "In this building, in this building, a temple to the law, they were-there were drinking fountains which said Whites Only. I tell my kid[ ] about that. He said: how did you put up with this, daddy?" Counsel then added: "The point I'm making is, the point I'm making, that some day, some

dants' reliance on the laws which provided it is lawful to market and sell cigarettes, to positions taken by defenders of slavery and of the holocaust. He compared the jurors task, to the fight against segregation, invoking Rosa Parks, Dr. King, and, as he put it, the whole civil rights movement of the 60's, as a fight against unjust laws. He then tied this period in the past directly to the defendants, by telling the jury to stand up to the defendants' lawful conduct in marketing and selling cigarettes.

Counsel continued: "Other people were arrested in the '60s because although this is a court of law, a court of-I remember as a kid walking into this building."

At the end of plaintiffs' first day of closing, defendants renewed their request for a mistrial, citing a variety of improper arguments including the statements quoted above. With reference to those statements, plaintiffs' counsel admitted that he had asked the jury to disregard the law, just as Dr. King and Rosa Parks had disregarded laws that were later "recognized as wrong":

> I submit that in a case where one of their strongest legal defenses is that: We make a legal product, it is a legal product, that it is perfectly acceptable for me to analogize about all the things in this country historically which have been legal but have been recognized as wrong in future years.

The court deferred ruling on defendants' mistrial motion but warned plaintiffs' counsel that he was proceeding at his own peril and that plaintiffs' counsel should consider "the possible [e]ffect it may have on any appellate court." The court told plaintiffs' counsel: "[What] you shouldn't do in

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day our kids and grandchildren are going to say . . . [h]ow did you let them get away with it? How did you let them get away with it?" Despite the court's ruling sustaining defendants' prior objection, counsel succeeded in completing his improper argument to the jury.

front of the jury is pander.... Shouldn't pander [to] the jury." Nonetheless, the court refused to grant a mistrial because of the length of the trial proceedings that had already occurred stating:

> We've been here 10, 11 months. In this one final argument day, which is the first day, there has been at least two, maybe even three motions for mistrials. It just seems to me that it would be foolish to put ourselves in that position because of whatever reason, whatever behavior, whatever was said, to lose this opportunity to get this case resolved. It's an unusual case.... And to throw it away at the last minute, after 10, 11 months, because of some comment made or something that's unforeseen that happens during closing argument, to me, is ludicrous. And I'm concerned. I really am. I don't think any of us really want it, even though motions have been made. I don't think we really want that to happen.

Florida courts uniformly condemn the type of pandering which occurred in this case as inflammatory and prejudicial. *See Murphy v. Int'l Robotic Systems, Inc.*, 766 So.2d 1010 (Fla.2000); *Johnnides v. Amoco Oil Co.*, 778 So.2d 443, 444-45 (Fla. 3d DCA 2001). Nullification arguments have absolutely no place in a trial and violate state and federal due process by exposing defendants to liability and punishment based upon lawful conduct. *Urbin v. State*, 714 So.2d 411, 420 (Fla.1998); *see also Harding v. State*, 736 So.2d 1230 (Fla. 2d DCA), *review denied*, 744 So.2d 454 (1999)(defense may not argue jury nullification); *United States v. Trujillo*, 714 F.2d 102, 106 (jury nullification argument would improperly encourage jurors to violate their oath and apply the law at their own caprice).

The prejudicial impact of the nullification arguments was further compounded by counsel's racially charged statements. These statements were made to a predominantly African-American jury panel and were clearly directed toward

persuading the jury to nullify the law.[37] As this Court has previously emphasized: "It is, of course, highly improper to interject even a reference to, let alone an accusation of racism which is neither justified by the evidence nor relevant to the issues into any part of our judicial system." *Perez v. State*,

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[37] That the prejudice was irreparable cannot be denied. After the Phase 1 closing arguments, the defendants discovered a book authored by plaintiffs' counsel in which he admits having used, almost verbatim, the same race-based nullification arguments in an earlier case (a murder trial in which he obtained an acquittal) and specifically emphasizes that such arguments are effective because they are incurably prejudicial. *Stanley Rosenblatt, Murder of Mercy: Euthanasia on Trial* (1992).

Plaintiffs' counsel, Mr. Rosenblatt, declares in his book that: "When the law conflicts with common sense, common decency and simple fairness and justice, it is the law that must yield." Although he concedes that attorneys cannot explicitly tell a jury to "ignore the law", Mr. Rosenblatt boasts of his ability to persuade juries "in a subtle way" to nullify the law: "The area I would need to spend the most time on [during trial] was my 'Piss on the Law' theme. Whenever I came close to being direct on that subject the State would object, and their objections would always be sustained. I had to figure a way to tell the jury in a subtle way that they should disregard the law."

The book describes Mr. Rosenblatt's tactics for obtaining jury nullification through racial pandering and references to unjust laws: "I assured [my client] that I would get out my words about Martin Luther King and the unjust laws he fought against. That guaranteed that the prosecutors would be on their feet in a flash, but the black juror, the black male alternative, and the white jurors would know exactly where I was coming from." A review of the comments made during the Phase 1 closing and those referred to in the book, reveals Mr. Rosenblatt followed the script he had previously laid out in his book, almost to the letter. Plaintiffs' counsel, Mr. Rosenblatt, was well aware that the nullification arguments and racial appeals he presented to the jury in this case would result in incurable prejudice.

689 So.2d 306, 307 (Fla. 3d DCA 1997) (reversal required where a prosecutor characterized defendants as engaging in conduct that was "divided along racial lines"); *see Wallace v. State*, 768 So.2d 1247, 1250-51 (Fla. 1st DCA 2000) ("Our system of justice cannot tolerate an attempt to exploit these feelings of racial prejudice to the extent that they may exist among those who serve on juries."); *F.J.W. Enterprises, Inc. v. Johnson*, 746 So.2d 1145, 1147 (Fla. 5th DCA 1999); *Terrazas v. State*, 696 So.2d 1309, 1310 (Fla. 2d DCA 1997); *Reynolds v. State*, 580 So.2d 254, 256 (Fla. 1st DCA 1991); see also Bird, 255 F.3d at 1150-51 (due process in a civil trial was violated by plaintiffs' reference in closing argument to "white racism in exploitation of Indians," where Indians sat on the jury); *see also Gen. Motors Acceptance Corp. v. Baymon*, 732 So.2d 262, 271-72 (Miss.1999) (plaintiffs' counsel played the race card by making inflammatory racial arguments to the jury, including assertions that defendant's conduct victimized primarily African-Americans and the poor).

An appeal to race so fundamentally damages the fairness of a trial, that even in the absence of an objection, a new trial is required in order to maintain the public trust in our system of justice. *See Murphy v. Int'l Robotic*, 766 So.2d at 1030; *see Robinson v. State*, 520 So.2d 1 (Fla.1988). Here, plaintiffs' counsel repeatedly violated this rule and thus a new trial would be required even if no objection had been made.

However, the fact remains that the defendants did object repeatedly, and, although the court sustained some of the objections, it could not unring the bell.[38] *See Williams v. State*, 715 So.2d 1152, 1153 (Fla. 3d DCA 1998)(reversal required even though objections to counsel's improper statements were sustained, because "[t]he die was cast-the damage was done"); *Muhammad v. Toys "R" Us, Inc.*, 668 So.2d 254, 258-59 (Fla. 1st DCA 1996)(collective import of counsel's

[38] The trial court itself recognized (during Phase 2) that even if an objection is sustained, "once it's out, it's out."

improper arguments required a new trial even though some objections were sustained); *Walt Disney World Co. v. Blalock*, 640 So.2d 1156, 1158 n.1 (Fla. 5th DCA 1994)("You can throw a skunk into the jury box and instruct the jurors not to smell it, but it doesn't do any good."); *see also O'Rear v. Fruehauf Corp.*, 554 F.2d 1304, 1309 (5th Cir.1977) (noting cautionary instructions are effective only up to a certain point; judges must realize that after repeated exposure of a jury to prejudicial information, "cautionary instructions will have little, if any, effect in eliminating the prejudicial harm").

Similarly egregious, plaintiffs' counsel repeatedly made legally improper arguments to the jury regarding the payment of any award, and personally vouched to the jury that the defendants would not go bankrupt. The prejudice caused by these statements is significant. By suggesting a large award would not bankrupt the defendants and that payments could be made in installments, plaintiffs' counsel ensured there would be no realistic check on the jury entering a bankrupting award.

This is clearly improper. A defendant's ability to pay a punitive award is to be measured as of the time of trial. Net worth cannot be based upon speculation regarding the defendant's future ability to pay. *See Cash v. Beltmann North American Co.*, 900 F.2d 109, 111 n. 3 (7th Cir.1990) (proper measure is net worth at time of trial); *Zhadan v. Downtown L.A. Motor Distrib., Inc.*, 100 Cal.App.3d 821, 161 Cal.Rptr. 225, 236 (1979) (same); *Fopay v. Noveroske*, 31 Ill.App.3d 182, 334 N.E.2d 79, 94 (1975) (jury may not base punitive damages on prediction of defendant's future earnings); *Bienvenu v. Dudley*, 682 So.2d 281, 285 (La.Ct.App.1996) (only "current" financial condition is relevant in determining appropriateness of exemplary damages); *Welty v. Heggy*, 145 Wis.2d 828, 429 N.W.2d 546, 549 (1988) (usual measure of wealth is net worth at the date of trial); *see also Brooks*, 707 So.2d at 376 (affirming punitive award where defendant failed to present evidence sufficient to establish his net worth

at the time of trial as a basis for comparison); Bould, 349 So.2d at 1181 (reviewing punitive award in comparison with defendant's net worth at the time of trial).[39]

Yet, plaintiffs counsel repeatedly violated this rule by urging the jury to assume any award would be payable in installments over decades into the future. The improper comments started during opening statements in Phase 2, when plaintiffs' counsel made an improper speaking objection in the presence of the jury stating:

> "That can happen in this case. There can be a pay-out."

During direct examination of his own witness, plaintiffs' counsel asked how much the defendants could afford to pay without going out of business:

> "if they had the right to pay out the money over an extended period of time?"

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[39] The plaintiffs' attempt to distinguish the defendants' cited cases by stating, without elaboration, that *Brooks v. Rios*, 707 So.2d 374 (Fla. 3d DCA 1998), and *Bould v. Touchette*, 349 So.2d 1181 (Fla.1977), do not support the defendants' position. However, the defendants' answer brief quotes both opinions, and these opinions expressly identify the relevant benchmark as "net worth at the time of trial," not some indefinite time in the future. The plaintiffs further claim that *Welty v. Heggy*, 145 Wis.2d 828, 429 N.W.2d 546, 549 (1988), and *Jonathan Woodner Co. v. Breeden*, 665 A.2d 929, 940-41 (D.C.1995), are distinguishable because in both cases the plaintiff had the burden of proving defendant's "wealth and ability to pay." This is a non sequitur. The proper definition of "ability to pay" does not vary depending on who has the burden of proof. Finally, plaintiffs suggest that *Bienvenu v. Dudley*, 682 So.2d 281, 285 (La.Ct.App.1996), conflicts with Florida law because it prohibited the jury's consideration of a defendant's "future worth or earning capacity 'unless reasonably certain.'" In fact, Florida law imposes this same requirement (*see, e.g., Wransky v. Dalfo*, 801 So.2d 239, 242 (Fla. 4th DCA 2001)), which the plaintiffs now seek to avoid.

And during cross-examination of defendant Liggett's CEO, plaintiffs' counsel asked:

> "You wouldn't go out of business if there was a payout arrangement?"

Continuing this theme through to closing argument, plaintiffs' counsel urged the jury to base its award on a $118 billion dollar "difference" between what the defendants supposedly offered to pay under a proposed (but never implemented) national settlement — "368 billion" over twenty-five years-and what the defendants did agree to pay in actual settlements with States — "250 billion" over twenty-five years. Settlements based upon twenty-five year payouts have no bearing on the defendants' current ability to pay.[40] Contrary to plaintiffs' counsels representations, the defendants were ordered to pay the $145 billion dollar award immediately into the court registry. Clearly the references to "payouts" were designed solely to mislead the jury and inflate the punitive award.

After numerous defense objections, the court held plaintiffs' counsel in contempt for continuing to make statements referencing extended payouts.[41] However, while acknowledging the impropriety of counsel's conduct, the court denied the defendants' request for a mistrial.[42]

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[40] The plaintiffs' argument that counsel's references to payouts was justified, is unavailing. The plaintiffs cite to criminal cases and statutes specifically allowing fines and restitution to be paid in installments. There are no similar provisions for the payment of punitive damages in a civil case. No case supports the assumption of a twenty-five year payout for the purposes of assessing punitive damages.

[41] Plaintiffs' counsel was fined $5,000 and warned that any subsequent reference to a payout would cost him $100,000.

[42] The court stated: "Now, the record does reflect I made a ruling [prohibiting plaintiffs' references to a payout]. And it will also reflect that I did admonish Mr. Rosenblatt not to do it again,

The misconduct continued, as plaintiffs' counsel referred to matters outside the evidence, made derogatory personal remarks about opposing counsel, and expressed his personal opinion to the jury. Plaintiffs' counsel maligned a defense attorney by name, calling the attorney's argument to the jury "a fraud." He expressed his personal opinions about the merits of the case stating the defendants' position made him grit his teeth and say to himself: "Can anyone buy this?"

Plaintiffs' counsel further repeatedly expressed his personal opinions about the defendants' witnesses, making such comments as: "I wanted to punch" one witness; that another witness "wouldn't know science if he fell on science"; that he was sure another witness "was ashamed to give this answer, but he gave it . . . under oath"; and that as to another witness, "I figured, well, this guy hasn't been prepped on the subject [by counsel], so maybe I'll get an honest answer". He told the jury the defendants' CEO witnesses lied to him under oath during their depositions, and that defendants had engaged in the "longest running con in the history of the world," and "our kids and grandchildren" will ask "how did you let them get away with it?"

This Court has expressly condemned all of the categories of misconduct plaintiffs' counsel engaged in here. *See, e.g., Johnnides*, 778 So.2d at 444 (attacks on integrity of counsel are both contemptible and condemnable); *Owens-Corning Fiberglas Corp. v. Crane*, 683 So.2d 552, 554-55 (Fla. 3d DCA 1996) (reversal required by derogatory comments concerning opposing counsel; "it is never acceptable for one at-

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and, unfortunately, he did; not only once, he did it several times. . . . I let it slide, and maybe I should not have. . . . But this being as unusual case as it is, I sort of took a back seat on some of these admonition issues and I didn't do anything definitive, and I really feel that maybe I should have, in retrospect." The trial court expressly recognized that plaintiffs' counsel inundated the jury with improper references to extended payments.

torney to effectively impugn the integrity or credibility of opposing counsel before the jury"); *Carnival Cruise Lines, Inc. v. Rosania*, 546 So.2d 736, 737 n. 1 (Fla. 3d DCA 1989) (new trial required because plaintiffs' counsel made disparaging remarks about the defendant).

We have also held that it is improper for counsel to express personal opinions about a case or comment on matters not in evidence. *See Cohen v. Pollack*, 674 So.2d 805, 806-07 (Fla. 3d DCA 1996) (an attorney's personal beliefs or feelings about the case are irrelevant and constitute reversible error); R. Regulating Fla. Bar 4-3.4(e) (a lawyer shall not allude to any matter "that will not be supported by admissible evidence"); *see generally Ruiz v. State*, 743 So.2d 1, 4 (Fla.1999) (the "role of counsel in closing argument is to assist the jury in analyzing [the] evidence, not to obscure the jury's view with personal opinion, emotion and non record evidence").[43]

Again, even though the court sustained objections to some of counsel's statements, as noted previously, the prejudicial effect was incurable.[44] *See Williams v. State*, 715

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[43] Hundreds of federal court cases are in accord. *See e.g. Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1151 (9th Cir.2001)(racial stereotyping will not be condoned in civil cases; reversing judgment in favor of plaintiff Indian owned company where plaintiff's counsel made inflammatory comments regarding Indians to a jury consisting entirely of Indian tribal members); *United States v. Doe*, 903 F.2d 16, 24-28 (D.C.Cir.1990) (reversing conviction where racially inflammatory remarks were made during summation); *Miller v. North Carolina*, 583 F.2d 701, 704, 706-08 (4th Cir.1978) (same).

[44] In the face of counsel's misconduct, the court's determination to proceed at any cost was an abdication of its most basic duty. "[U]nless trial judges are willing to grant mistrials or new trials based upon prejudicial conduct of counsel, there will be no elimination of such conduct." *Murphy v. Murphy*, 622 So.2d 99,

So.2d at 1153 ("The die was cast-the damage was done"); *Muhammad*, 668 So.2d at 258-59; *Walt Disney*, 640 So.2d at 1158 n. 1. *See, e.g., Maercks*, 549 So.2d at 200 ("[w]hether we consider only the remarks as to which the objections were overruled, or the closing argument as a whole, there must be a new trial."); *Del Monte Banana Co. v. Chacon*, 466 So.2d 1167, 1175 (Fla. 3d DCA 1985) (the "cumulative impact of plaintiff's counsel's complained-of actions at trial clearly mandates reversal").

Enforcement of the settled prohibitions against this type of prejudicial misconduct was especially important in the context of this massive class action against a highly unpopular industry. The cumulative and inherent inflammatory impact of these arguments and conduct is clearly reflected by the verdict. Plaintiffs' counsel succeeded in inflaming the jury's passions as evidenced by the astronomical, bankrupting award.[45] In sum, the improper comments of plaintiffs'

102(Fla. 2d DCA 1993). As this Court stated in Gomez v. State, 751 So.2d 630, 632-33 (Fla. 3d DCA 1999):

> There comes a point and time in the conduct of a trial that the trial judge should and must intervene in the egregious conduct, whether it has been challenged or not. It is the trial judge who is the central figure in the courtroom especially in the eyes of a jury. The jury looks to the trial judge as the only neutral, impartial, detached participant in the trial.

In my view, the trial court erred in deciding not to grant a mistrial simply because this was a lengthy trial.

[45] The defendants point out that this is not the first time plaintiffs' counsel, Mr. Rosenblatt, has engaged in the type of misconduct requiring reversal. In *Maercks v. Birchansky*, 549 So.2d 199 (Fla. 3d DCA 1989), this Court reversed a judgment in favor of the plaintiff based upon the improper arguments and conduct of her attorney, Mr. Rosenblatt. Similar to the present case, in Maercks, Mr. Rosenblatt improperly made derogatory comments about opposing counsel and "asserted his personal opinion as to the credibility of a

counsel further deprived the defendants of due process and a fair trial, thus additionally requiring reversal.

VI. Liggett: Proof of a "Runaway Jury"

The punitive award against defendant Liggett is not supported by the evidence and demonstrates the jury was irreparably prejudiced in entering the grossly excessive $145 billion dollar award. The Phase 1 verdict found all defendants liable, including defendant Liggett Group, Inc. and defendant Brooke Group Holding, Inc. (hereafter collectively referred to as "Liggett/Brooke"). However, in the first part of Phase 2, the jury allocated zero fault to Liggett with respect to the non-punitive counts. Liggett/Brooke's motion to set aside the verdict as inconsistent was denied, and it was held jointly and severally liable for 100% of the compensatory damages award to each of the three named plaintiffs.

Yet, there was no evidence Liggett/Brooke had any knowledge about the health effects of smoking prior to this time. Liggett/Brooke was the only company that did not ammoniate the cigarettes it sold. Liggett/Brooke did not participate in the 1950's industry strategy meetings, did not sign or endorse the Frank statement, and was not involved in the creation of the Tobacco Industry Research Committee. Significantly, none of the class representatives purchased or smoked Liggett/Brooke cigarettes.

The verdict as to Liggett/Brooke must be reversed. Not only was there manifestly insufficient evidence to support the judgments in favor of the three named plaintiffs,[46] there was

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witness, the justness of his client's cause and the perfidy of the defendant." Regardless of the fact that some objections to the improper remarks were sustained, we reversed for a new trial based upon Mr. Rosenblatt's impermissible conduct.

[46] It is aphoristic that a plaintiff cannot prevail on claims for negligence, breach of warranty or strict liability, unless the plaintiff establishes that the product which allegedly caused the plaintiff's injury was manufactured or sold by the defendant. *See Mahl v. Dade*

likewise no evidence to support any punitive award, let alone an award that will destroy Liggett/Brooke many times over.[47] The patent impropriety of the verdict against Liggett/Brooke demonstrates the prejudicial impact of the errors at trial which, combined with the improper conduct of counsel and the trial plan, compels reversal as to all the defendants.

Despite the fact that not one of the three plaintiffs ever used a Liggett/Brooke product, the jury was obviously swept along in lemming-like fashion to find all the defendants responsible because they participated in the tobacco industry. This is not the law. Mere participation in the tobacco industry does not destine a corporation to legal suicide upon the shores of bankruptcy.

Pipe and Plumbing Supply Co., Inc., 546 So.2d 740 (Fla. 3d DCA 1989). Here, it is undisputed that the Liggett defendants did not manufacture or sell any of the products that allegedly caused injury to the individual plaintiff representatives. It is also undisputed that the jury found the Liggett defendants zero percent at fault with respect to each of the named plaintiffs. The inconsistency in the verdict alone, fundamentally undermines the verdicts underlying basis and requires reversal. *See Garriga v. Guerra*, 753 So.2d 146 (Fla. 3d DCA 2000); *Chabad House-Lubavitch of Palm Beach Cty., Inc. v. Banks*, 602 So.2d 670 (Fla. 4th DCA 1992); *Wharfside Two, Ltd. v. W.W. Gay Mechanical Contractor, Inc.*, 523 So.2d 193 (Fla. 1st DCA 1988).

[47] The jury awarded $790 million dollars in punitive damages against the Liggett defendants. This amount is twenty-three times Liggett's net worth, almost twice Liggett's gross revenues, ten times Liggett's operating income, and ten times Liggett's current assets. There was no valid evidentiary or legal basis for the jury's Phase 1 and Phase 2 findings regarding Liggett. Thus the claims against the Liggett defendants clearly should not have proceeded to the punitive damages phase. Moreover, it is difficult to fathom how the evidence presented could possibly rise to the level of reprehensibility necessary to support punitive damages where most industry experts uniformly praised Liggett as a model for how a tobacco company should conduct itself.

Here, judgment was entered against Liggett/Brooke for medical claims for smoking cigarettes that Liggett/Brooke did not make. The only explanation for this clearly improper verdict against a company whose cigarettes none of these plaintiffs ever used, is that the integrity of the entire trial was compromised as a result of the trial errors and improper conduct of counsel.[48]

Clearly there is no basis for the claims against Liggett/Brooke. The jury "ran amuck." Since there is no distinction between the claims as to the other defendants, which were all tried together and which were all subject to the same arguments and techniques, the tainted jury verdict requires that the entire case be reversed.

VII. The Punitive Damage Claims Are Barred

The punitive award is precluded by the settlement agreements which resolved all claims asserted by the states, as well as the final judgment resolving the state of Florida's suit against the tobacco industry, which expressly included claims for punitive damages.

In *Florida v. American Tobacco Co.*, No. 95-1446 AH (Fla. 15th Jud.Cir.1995), the State of Florida sued the same defendants for fraud, conspiracy, and the sale of a defective

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[48] Significantly with regard to the general verdict against all the defendants, there were no specific findings as to any act by any defendant at any period of time. The trial plan enabled the plaintiffs to try fifty years of alleged misconduct that they never would have been able to introduce in an individual trial, which was untethered to any individual plaintiff. The plaintiffs incited juror prejudice against an unpopular industry and created a composite plaintiff who smoked every single brand of cigarettes, saw every single advertisement, read every single piece of paper that the tobacco industries ever created or distributed, and knew about every single allegedly fraudulent act. It was error to permit the plaintiffs to use the class procedural device in order to alter the substantive rights of the parties in their favor.

and "addictive" product, asserting punitive-damage and other claims. Florida's allegations of misconduct were the same as those in the present case.

Other states around the country brought similar suits against the tobacco industry. The states settled all of their cases in 1997 and 1998. Separate agreements covered Florida and three other states. Florida settled and released its claims in 1997, by entering into the Florida Settlement Agreement ("FSA"), which resolved with finality all of Florida's claims, "including those for punitive damages."

A multistate agreement (the Master Settlement Agreement or "MSA") covered the remaining forty-six states. Under these agreements, defendants are obligated to pay the states more than $200 billion dollars (subject to specified adjustments) over the first twenty-five years, and to pay the states billions more in perpetuity after that.

Based upon these agreements, the defendants moved to preclude any punitive award asserting all punitive damage claims against the tobacco industry had been settled in the lawsuit brought by the State of Florida. The trial court denied the motions. Since application of res judicata is a question of law, our standard of review on this issue is de novo. *See, e.g., In re Piper Aircraft Corp.*, 244 F.3d 1289, 1295 (11th Cir.2001) ("A court's application of res judicata presents questions of law reviewed de novo"), *cert. denied*, 534 U.S. 827, 122 S.Ct. 66, 151 L.Ed.2d 33 (2001).

In *Young v. Miami Beach Improvement Co.*, 46 So.2d 26 (Fla.1950), the Florida Supreme Court held that a judgment in a suit involving a municipal corporation which resolved "a matter of general interest to all its citizens" was binding upon all citizens even though they were not parties to the suit. The court reasoned that each citizen "is a real, although not a nominal, party to such judgment, and cannot relitigate any of the questions which were litigated in the original action." *Young v. Miami Beach Improvement Co.*, 46 So.2d at 30.

Thus, once a government agency resolves a matter of public rights or interests, the same matter cannot thereafter be relitigated by private parties.

Similarly, in *Castro v. Sun Bank of Bal Harbour, N.A.*, 370 So.2d 392 (Fla. 3d DCA 1979), this Court held that private parties were barred from re-litigating certain public-nuisance and zoning claims already settled by the state. The settlement was binding on private parties regardless of whether they were formal parties to the original action, because they were "citizens of the State of Florida and the City of Miami at the time of the litigation." The same rule applies here.

The claims for punitive damages in the *Florida v. American Tobacco Co.* case and in this action are based on the same alleged facts. The punitive-damage claims in both cases addressed the same alleged misconduct and the same public interest. The plaintiffs, as private parties, do not have a "right" to punitive damages; punitive damages are awarded solely as a matter of public rights or interests, in order to serve the public policy of punishment and deterrence. *See, e.g., Gordon v. State*, 585 So.2d 1033, 1035-36 (Fla. 3d DCA 1991) (punitive damages "serve as punishment for what amounts to a public wrong"; private plaintiffs have "no cognizable, protectable right to the recovery of punitive damages at all"), *aff'd*, 608 So.2d 800 (Fla.1992); *see also Chrysler Corp. v. Wolmer*, 499 So.2d 823 (Fla.1986)(punitive damages are imposed for egregious conduct that constitutes a public wrong); *Ingram v. Pettit*, 340 So.2d 922 (Fla.1976)(same). Accordingly, as a matter of law, Florida's settlement and release, and the res judicata effect of the resulting final judgment, preclude the plaintiffs' punitive-damage claims here.

Having improperly allowed the punitive damages claim to proceed, the trial court committed further reversible error by instructing the jury not to consider the FSA and MSA with regard to the issue of punishment and deterrence. By

the time the Phase 2 trial began, defendants had already paid over $14 billion dollars to the states, including $1.7 billion dollars to Florida. Enormous financial obligations were imposed by the settlements that resolved all of the states' claims, including claims for punitive damages. Additionally, the FSA and MSA impose sweeping deterrent measures on defendants' future conduct, which included prohibitions on advertising and other activities that could not be constitutionally imposed absent the defendants' agreement.[49]

However, over the defendants' objection, the court instructed the jury:

> I hereby instruct you that the Florida Settlement Agreement and the Master Settlement Agreement do not constitute punishment of or deterrence to these defendants. You may consider evidence as to the Florida Settlement Agreement and the Master Settlement Agreement solely on the basis of the defen-

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[49] For example, the MSA: (a) dissolves the Council for Tobacco Research and the Tobacco Institute; (b) prohibits the targeting of youths in cigarette advertising, promotion, or marketing; (c) bans virtually all outdoor and transit advertising of tobacco products, including billboards; (d) bans the production, distribution, or sale of tobacco brand name products such as caps, jackets, and bags; (e) prohibits any agreement to limit or suppress research on the health effects of tobacco; (f) prohibits the making of any material misrepresentation of fact regarding the health consequences of using any tobacco product; and (g) provides for publication on the internet of a vast number of documents produced in discovery in past and future cases against the tobacco industry. Pursuant to the MSA, the attorneys general have the authority to monitor defendants' compliance and to enforce the MSA in court. In the event of a continuing violation, an attorney general may seek monetary fines, civil contempt, or even criminal sanctions.

dants' financial resources and obligations and changed conduct.[50]

Punishment and deterrence are the only legitimate objectives for a punitive damages award. The FSA and MSA clearly qualify as evidence relevant to punishment and deterrence. The defendants were entitled to have the jury consider the FSA and MSA as potential mitigating factors in determining the need for further punishment and deterrence, especially with regard to claims for the same alleged misconduct. *See Owens-Corning Fiberglas Corp. v. Ballard*, 749 So.2d at 487; *Johns-Manville Sales Corp. v. Janssens*, 463 So.2d 242 (Fla. 1st DCA 1984); *St. Regis Paper Co. v. Watson*, 428 So.2d 243 (Fla.1983); *see also Humana Health Ins. Co. of Florida, Inc. v. Chipps*, 802 So.2d 492 (Fla. 4th DCA 2001)("jury should have been allowed to consider any [potentially mitigating] evidence"); *Bankers Multiple Line Ins.*, 464 So.2d at 533 (parties should be permitted to present all evidence relevant to damages issues); *Nordyne, Inc. v. Florida Mobile Home Supply, Inc.*, 625 So.2d 1283 (Fla. 1st DCA 1993)(same); Fla. Std. Jury Instr. (Civ.) PD1(b)(2).

Although a trial court generally has broad discretion in formulating jury instructions, a defendant is entitled to have the jury instructed "on the law applicable to the issues raised by the evidence." *Klipper v. Gov't Employees Ins. Co.*, 622

[50] Although the instruction allowed the jury to consider the FSA and MSA on the issue of "changed conduct," this language does not equate with directing the jury to consider the agreements as to the need for punishment and deterrence. The two sentences of the instruction would negate each other, if "changed conduct" were interpreted as equivalent to the need for "punishment" and "deterrence." Such an interpretation would invalidate the instruction as contradictory and confusing. *See, e.g., Jacobs v. Westgate*, 766 So.2d 1175 (Fla. 3d DCA 2000) (reversal required "where a jury might reasonably have been misled, regardless of whether it has actually been misled"); *Poole v. Lowell Dunn Co.*, 573 So.2d 51 (Fla. 3d DCA 1990)(same).

So.2d 1141, 1143 (Fla. 2d DCA 1993). The trial court erred in providing the jury with an instruction that removed a disputed issue from the jury's consideration. *See South Motor Co. of Dade County v. Accountable Constr. Co.*, 707 So.2d at 912.

This error effectively precluded the defendants from presenting crucial mitigation evidence in the form of the FSA and MSA to support the argument that they had already received heavy financial obligations and binding deterrent measures for precisely the same conduct. The resulting prejudice is clearly evidenced by the astronomically excessive punitive damages award, and further exemplifies why reversal is required.

VIII. Conclusion: Awarding the GNP of Several European Countries Is Error

In conclusion, the entire judgment must be reversed and the class decertified. The class fails the requirements of predominance and superiority. Any initially imagined savings of judicial resources and expense, have been dispelled by the ensuing litigation and the overwhelming procedural problems inherent in the certification of this type of smokers' litigation. Those class members whose claims have not yet been tried, should be allowed to proceed individually.

Class certification in mass tort actions such as this has been historically disfavored by courts throughout the nation. This hesitancy to certify complex mass tort actions is based upon the evolving recognition that the class action mechanism is generally not superior for these types of cases, and results in a higher than normal risk of infringing upon the rights of defendants.[51]

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[51] Class certification significantly increases the number of unmeritorious claims and dramatically affects the stakes for defendants. *See Agent Orange*, 818 F.2d at 165-66. Defendants are more likely to be found liable in class action litigation and the damage awards in such proceedings are significantly higher. *See Manual*

The present case presents a classic example of the inherent dangers that arise when a complex mass tort action is improperly certified. As discussed throughout this opinion, there are multiple sound legal bases why the result of this class action trial, including the punitive damages award, cannot be sustained.

The trial plan which produced the $145 billion dollar award, violates Florida law, violates this Court's 1996 certification decision, and is unconstitutional. The proceedings that produced the findings of entitlement and the $145 billion dollar award were irretrievably tainted by class counsel's misconduct, and the award is bankrupting under Florida law. The fate of an entire industry and of close to a million Florida residents, cannot rest upon such a fundamentally unfair proceeding. Our system of justice requires more. Accordingly, we reverse the judgment below with instructions to decertify the class.

Reversed and remanded with instructions to decertify the class.

For Complex Litigation § 33.26 n. 1056; *Kenneth S. Bordens and Irwin A. Horowitz, Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions*, 73 Judicature 22 (1989). Aggregation of claims places insuperable pressure upon defendants to settle, rather than face the unacceptably high risk of an all-or-nothing verdict; settlements by defendants in these cases have been referred to as "judicial blackmail." *See Peter H. Schuck, Mass Torts: An Institutional Evolutionist Perspective*, 80 Cornell L.Rev. 941 (1995); *Rhone-Poulenc Rorer, Inc.*, 51 F.3d at 1293 (7th Cir.1995).

APPENDIX C

[Final Judgment and Amended Omnibus Order of the Circuit Court of the Eleventh Judicial Circuit for Miami-Dade County, Florida (November 7, 2000)]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 94-08273 CA-22

HOWARD A. ENGLE, M.D., et al.,
Plaintiffs,

v.

RJ REYNOLDS TOBACCO COMPANY, et al.,
Defendants

_____/

AMENDED FINAL JUDGMENT AND AMENDED OMNIBUS ORDER

KAYE, Circuit J.

THIS CAUSE having come on to be heard on the Defendants' **"Motion At The Conclusion Of Phase II-B For A New Trial Or Remittitur, To Set Aside The Verdict, And For Entry Of Judgement In Accordance With Defendants' Motions For Directed Verdict, To Grant All Motions For Mistrial previously pending Or Denied, To**

Decertify The Class, and Alternative Motion For New Trial", and the Court having been fully advised pursuant to over 190 pages contained in the "Motion", and in addition, having read the 78 page memo in support for a New Trial and Or Remittitur, and in addition having read over the contents of 6 rather voluminous loose leaf volumes submitted by the defense, and several other equally voluminous loose leaf volumes submitted by the plaintiffs, and having reviewed the applicable Law as submitted by both sides, the Court feels it can rule on the issues without further argument, oral or otherwise.

THEREFORE, the Court issues the following: **Omnibus Order:**

To say the least, this has been a most unusual and precedent setting trial. It consumed over TWO YEARS of hard fought trial by batteries of lawyers, required over 150 witnesses, involved thousands of documents and exhibits, and generated over 57,000 pages of testimony. The issues were highly complex and often novel, straining the ingenuity of the attorneys and of the Court.

This Case was brought alleging eight separate counts — **1-Strict Liability, 2-Fraud and Misrepresentation, 3-Conspiracy to Misrepresent and Commit fraud, 4-Breach of Implied Warranty and Merchantability and Fitness, 5-Intentional Infliction of Emotional Distress, 6-Negligence, 7- Equitable Relief, and 8-Breach of Express Warranty.**

The defense filed motions for directed verdict as to each count and the Court will address each count separately. Many of defendants motions, although titled separately, make reference to the same material relating to an individual count, but combining references to separate plaintiffs. The ruling on the efficacy of each count will therefore apply to each plaintiff unless otherwise noted.

The defendants have filed 22 Motions for Directed Verdict, and more than 24 other motions dealing with the issues in this case all of which were deferred and need resolution.

First, it should be noted that the jury in both Phase I and II A found each of the defendants Guilty as to all counts with the exception of count 7 for Equitable relief which the court dismissed previously under the plaintiffs request for Medical Monitoring.

Second, because it may become important in resolving some of the motions, the following is a list of the manufacturer, and their products, each of the plaintiffs class representatives were alleged to have smoked over the years.

MARY FARNAN

1. RJ Reynolds ---------- Camels, Salem, Winston, Winston Lights
2. Philip Morris ---------- Marlboro
3. Brown and Williamson - Viceroy, Raleighs, Tareyton, Carlton, Pall Mall
4. Lorillard ---------- Kent
5. American Tobacco ------ Lucky Strike

FRANK AMODEO

1. RJ Reynolds ---------- Winston, Camels
2. Philip Morris ---------- Marlboro, Virginia Slims
3. Brown and Williamson - Viceroy
4. American Tobacco ------ Lucky Strike

ANGIE DELLA VECCHIA

1. RJ Reynolds ---------- Winston Lights

2. Philip Morris ----------Benson & Hedges, Marlboro, Cambridge Lights, Parliament
3. Brown and Williamson - Pall Mall, Tareyton
4. Lorillard----------Kent
5. American Tobacco ------Lucky Strike

MOTIONS FOR DIRECTED VERDICTS

As to Count I — Strict Liability —

There was more than sufficient evidence at trial to satisfy the legal requirements of this Count and to support the jury verdict that cigarettes manufactured and placed on the market by the defendants were defective in many ways including the fact that the cigarettes contained many carcinogens, nitrosamines, and other deleterious compounds such as carbon monoxide. That levels of nicotine were manipulated, sometime by utilization of ammonia to achieve a desired "free basing effect" of pure nicotine to the brain, and sometime by using a higher nicotine content tobacco called Y-1, and by other means such as manipulation of the levels of tar and nicotine. The evidence more than sufficiently proved that nicotine is an addictive substance which when combined with other deleterious properties, made the cigarette unreasonably dangerous. The evidence also showed some cigarettes were manufactured with the breathing air holes in the filter being too close to the lips so that they were covered by the smoker thereby increasing the amount of the deleterious effect of smoking the cigarette. There was also evidence at trial that some filters being test marketed utilize glass fibers that could produce disease and deleterious effects if inhaled by a smoker. In addition, there was adequate evidence that all three of the class members whose claims were tried in Phase II-A smoked one or more brands manufactured by one of more of the defendants.

The defendants have claimed that this count should have been dismissed as being barred by Section 402A of the restatement of Torts, comment (i). This Court is guided by Burton v. R.J. Reynolds Tobacco Co., 884 F. Supp. 1515 (D Kan. 1995) quoting Rogers v. R .J. Reynolds Tobacco Co. 557 N.E. 2nd 1045 (Ind.App. 2 Dist. 1990) which said:

> "The reference in comment (i) to tobacco . . . does not as a matter of law remove all claims of defective tobacco products from the operation of 402A...[footnote 8]; Failing to warn the consumer of certain properties, such as nicotine addiction, in conjunction with its harmful qualities, render the product unreasonably dangerous....Also, a design defect which renders the product more addictive than it could be or addictive when it need not be at all, may render the cigarette unreasonably dangerous in conjunction with its harmful qualities"

The Motion for Directed Verdict as to Count I Strict Liability ,is DENIED

As to Count II — Fraud and Misrepresentation —

Abundant evidence was adduced at trial to support the legal requirements of this Count and to support the jury verdict of the Count of Fraud and Misrepresentation. From the early years of advertising up until July of 1969, defendants engaged in concerted advertising campaigns extolling the virtues of smoking and making references to the lack of health risks and stressing the alleged benefits of smoking. References were made to Doctors smoking with no ill effects, to Radio and Television stars like Arthur Godfrey, and to sports figures, all of whom smoked and hawked the health benefits of tobacco or lack of health risks. All the while the defendants knew by their own research and the work of others, that cigarettes were carcinogenic and caused cancer and other deadly diseases. Defendants reneged on their promises con-

tained in the Frank Statement of 1954, and never revealed to the public the addictive nature of tobacco-a fact they all recognized but never admitted. Even after 1969, defendants continued campaigns of misinformation about the dangers of smoking and fostered the myth that there was a continuing controversy about causation in face of the over whelming contrary body of evidence worldwide. Not only was there misinformation supplied by defendants, there was concealment of known information which affected the health of the public at large. Despite a duty not to deceive, and a duty to disclose, the defendants failed to reveal information they knew was contrary to that which they disseminated - information that the defendants had developed through their own research. The concept of duty to disclose and duty not to deceive can be stated in no clearer terms than the words of the Court in Joiner v. McCullers, 28 So 2nd 823 (Fla 1947)

> "—the rule that fraud cannot be predicated of a failure to disclose facts where the information is as accessible to one party as to the other, and the truth may be ascertained by the exercise of reasonable diligence, does not justify a resort to active deceit or fraud, and hence, does not apply where a party in addition to non-disclosure uses any artifice to throw the other party off his guard and to lull him into a false security. The concealment becomes a fraud where it is effected by misleading and deceptive talk, acts of conduct, or is accompanied by misrepresentations, or where in addition to a party's silence there is any statement, or act on his part which tends affirmatively to a suppression of the truth, or to a covering up or disguising of the truth, or to a withdrawal or distraction of a party's attention from the real facts; then the line is overstepped and the concealment becomes fraud."

These words are as good today as they were in 1947 and apply directly to the Fraud count and the Conspiracy count

below. The only conclusion that can be drawn from such activity is that the defendants intended that the public rely upon that which the defendants generated over extended periods of time and which the defendants knew were false. Having been exposed over the years to countless advertising exposures, it is reasonable, and the jury so found, that the plaintiffs relied upon the representations made by the defendants.

The Motion for Directed Verdict as to Count II Fraud and Misrepresentation is DENIED.

As to Count III Conspiracy to Misrepresent and Commit Fraud,—

The Court finds sufficient and more than adequate evidence to satisfy the legal requirements of this Count and to support the jury verdict that the defendants acted in concert to misinform and deceive. The Council For Tobacco Research and the Tobacco Institute were creatures of a joint effort by the defendants to either hide and/or conceal scientific research, or provide disingenuous and misleading information to the public at large .Evidence was established that these entities were not only funded and supported by the defendants, but were in some cases controlled and manipulated by them. The establishment of the "Special Products" division to allow corporate counsel to be involved and thereby invoke the protection of the "attorney-client" privilege all the while claiming these entities were independent of the defendants, is a prime example of the collusion involved . In addition thereto, representatives met from time to time at conferences and retreats to discuss and share information about the health effects and addictive nature of smoking and reached certain agreements on how to deal with the scientific community, including the Surgeon Generals, and how best to continue the perceived controversy in the public's eye.

The Motion for Directed Verdict as to Count III Conspiracy to Misrepresent and Commit Fraud, is DENIED.

As to Count IV — Breach of Implied Warranty of Merchantability and Fitness—

The record reflects sufficient evidence to support the legal requirements of this Count and the jury verdict that each of the three class representatives whose claims went to trial, adequately met the requirement to sustain the count of Implied warranty. The testimony revealed that each smoked and were exposed to the various brands manufactured by the defendants not only by the act of purchasing the products from retailers but also through the promotional activities of the defendants. Specific reference was made in the evidence to the mailin coupon program whereby the defendants, by direct mail, supplied the plaintiffs with the various brands which they smoked These coupons where found in packs of cigarettes purchased by the plaintiff and were not available without a purchase-therefore were not "free". Other promotions offered merchandise that was available for redemption with purchased cigarette coupons. Still other promotions distributed free samples without a purchase directly from the manufacturer. The defendants rely upon the holding of Kramer v. Piper Aircraft Corp., 520 So 2nd 37 (Fla. 1988) and Westinghouse Corp.,V Ruiz., 537 So 2nd 596 (Fla. 3rd DCA 1988) which stands for the proposition that a no-privity breach of implied warranty, is supplanted by the doctrine of strict liability. However, in this case the Court specifically finds that the evidence, as referred to above, clearly establishes the requirement of "privity" necessary to sustain a claim for implied warranty. See, i.e. *Sheppard v. Revlon, Inc.*, 267 So 2nd 662 (Fla. 3rd DCA 1972)

The motion for Directed Verdict as to Count IV Breach of Implied Warranty of Merchantability and Fitness, in so far as it is related to privity, is DENIED.

As to Count V — Intentional infliction of Emotional Distress —,

The evidence in this case supports the legal requirements of this Count and the jury verdict that the plaintiffs not only suffered severe injuries caused by smoking cigarettes but, also suffered extreme mental anguish and disability from the emotional distress directly attributable to the physical injury. In addition thereto the plaintiffs also suffered emotional distress upon the realization of being addicted to the defendants product, a condition that doesn't necessarily manifest itself in any physical injury. Florida Courts have recognized the principle that there can be emotional distress with or without physical injury or impact. (Metropolitan Life Ins. Co. v. McCarson 467 So nd 277 Fla.1985) and (Eastern Airlines, Inc. v. King. 557 So 2nd 547 Fla. 1990). Survivors are also entitled to, and so the jury found, a claim for Infliction of Emotional Distress.

The Motion for Directed Verdict as to Count V- Intentional Infliction of Emotional Distress is, Denied.

As to Count 6 — Negligence —

The verdict of the jury on the issue of Negligence is well supported by the evidence. The elements of negligence have certainly been sufficiently proven by the testimony in this case in that any reasonable person or entity, armed with the information the defendants had, should have done that which a reasonable person would have done under like circumstances, or should not have done what a reasonable person would not do under like circumstances.. It is obvious that a reasonable person or entity would not have allowed a condition to exist that he or it knew would injure someone, without taking appropriate measures to prevent it. The defendants according to the testimony, well knew from their own research, that cigarettes were harmful to health and were carcinogenic and addictive. By allowing the sale and distribu-

tion of said product under those circumstances without taking reasonable measures to prevent injury, constitutes, in this Courts opinion, and in the opinion of the jury as it turns out,- negligence.

The Motion for Directed Verdict as to Count VI Negligence,, is DENIED.

As to Count VII — Equitable Relief —

This Count has previously been dismissed by the Court under the heading of Medical Monitoring.

The Motion for Directed Verdict as to Count VII- Equitable Relief, is GRANTED

As to Count VIII — Breach of Express Warranty —

Evidence adduced at trial more than adequately supports the jury verdict and satisfied the legal requirements of express warranty in that the defendant tobacco companies for decades prior to July 1969, advertised their products as being safe, free of medical risks, etc, by using such techniques as having "doctors" promoting the products, etc. In some instances making claims that a particular brand is easier and smoother on the throat and less irritating. Subsequent to 1969, the advertising campaign shifted to claims of low tar and nicotine when in truth the defendants knew the tar and nicotine levels were either false or manipulated.

The Motion for Directed Verdict as to Count VIII- Express Warranty, is DENIED.

In addition to the above, the defendants have filed numerous other motions for Directed Verdicts, which the Court will treat below:

Statute of Repose —

This issue as it relates to the facts of the case, has been resolved up to now by the decision in Pulmosan Safety Equipment Corp. v. Earl Barnes, 25 FLW S12 (case No.

SC94544 Opinion filed January 6th, 2000). The Supreme Court reaffirmed the decision in Diamond v. E.R. Squibb & Sons, Inc. 366 So 2nd 1221 (Fla 3rd DCA 1979) and held that there is an exception to the Statute of Repose in cases of latent injury in product liability cases.

> "Therefore, we hold that in a products liability action where the now-defunct statute of repose is still applicable, the latent injury exception remains viable so that the statute of repose will not extinguish the plaintiff's cause of action if his or her injuries are latent and undiscoverable within the repose period."

This concept has been following by the 2nd District in a recent opinion, Laschke v Brown and Williamson Tobacco Corporation et. al. 2000 WL 868251 (FLA.App. 2nd Dist.) in which the Court said:

> "The conspiracy of the defendants has been ongoing since at least December of 1953 and has been continuous through the present. We conclude that, because of the dispute surrounding these allegations, the date of the last act done in furtherance of the conspiracy presents a question of fact not proper for resolution on summary judgement. Therefore, the Laschkes' claim for conspiracy to commit fraud cannot be said to be barred by the statute of repose as a matter of law on this record."

The Motion for Directed Verdict on the issue of the Statute of Repose, is DENIED.

Statute of Limitations re: Frank Amodeo

The jury in Phase 11A determined that plaintiff Frank Amodeo knew or should have known on or before May 5, 1990 (4 years prior to the filing of this case) that he was addicted to smoking, and further, that he had cancer reasonably caused by smoking. This finding acts as a bar to Frank

Amodeo's claims for Strict Liability, Implied and Express Warranty, Negligence, and Emotional Distress. It does not however bar the claims under Fraud and Conspiracy pursuant to the holding in Pulmosan Safety Equipment Corp. v. Earl Barnes, 25 FLW S12 (case # SC 94544 January6 2000) which recognizes an exception to the Statute Of Repose in the case of continuing fraud.

The Motion for Directed Verdict on the Statute of Limitations re: Frank Amodeo is GRANTED as to the Counts of Strict Liability, Implied Warranty, Express Warranty, Negligence, and Intentional Infliction of Emotional Distress, and DENIED as to the Counts of Fraud and Misrepresentation, and Conspiracy to Misrepresent and Commit Fraud.

Federal Preemption

The seminal case regarding Federal preemption in tobacco cases is Cipollone v. Liggett Group. 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2nd 407 (1992). That case specifically exempted claims of Fraud and Conspiracy to commit Fraud and Misrepresentation from the pre-emption effect of the 1969 Act.

> "In the 1969 Act, Congress offered no sign that it wished to insulate cigarette manufacturers from long standing rules governing fraud. . . Petitioner's fraudulent misrepresentation claims that do arise with respect to advertising and promotions are not pre-empted . . . such claims are...predicated on . . . the duty not to deceive."

The 1969 Act does not pre-empt any claim for acts committed prior to 1969 in any event, and certainly does not pre-empt any acts of fraud or conspiracy committed by the defendants subsequent to 1969. The record in this case is replete with evidence relating to the fraud and conspiracy

claims which the jury apparently considered , and believed, in finding the defendants guilty of those counts.

As to the issue of addiction, there seems to be a head on conflict between the issue of "failure to warn" after 1969, and the concept that the defendants had a "duty not to deceive". Given the merits of those claims, and the realization that the defendants had the knowledge that nicotine addicts as early as the 50's and 60's and still publically declared, well into the 80's and 90's, that nicotine is not addictive, the record of the trial reflects that the plaintiffs presentation opted for evidence of a "duty not to deceive' which goes directly to the fraud and conspiracy exception under *Cipollone*, rather than the "failure to warn" preemption element. Also see Joiner v. McCullers, 28 So 2nd 823 (Fla.1974).supra.

The motion for Directed Verdict on the grounds of Federal Preemption is DENIED.

Failure to Warn Pre-1969

For guidance the Court relies on the decision in Burton v. R.J. Reynolds Tobacco Co., 884 F.Supp. 1515 (D. Kan. 1995), which definitively rejected the defendants theory that there was no duty to warn because everybody was aware of the dangers of smoking. The defendants position is disingenuous because the defendants for decades had decried the health risks of smoking and publically stated that there was no conclusive proof cigarettes caused disease. At the same time the defendants were aware that nicotine was addictive —— something the general public did NOT know. Also, the defendants were under a duty not to deceive. This concept can be stated in no clearer terms than the words of the Court in Joiner v McCullers, 28 So 2nd 823 (Fla 1947).supra.

The Motion for Directed Verdict for Failure to Warn is DENIED.

Motions for Directed Verdicts on Behalf of Council For Tobacco Research and Tobacco Institute

Despite protests by these defendants that the plaintiffs were unable to point to any specific act of either of these defendants to establish plaintiffs claims, the jury, having found these defendants guilty on all counts for which they were charged, apparently found enough in the evidence to conclude that the thousands of pieces of information to which the plaintiffs were exposed over several decades, came from the concerted efforts of the defendants to provide such information to the public. Ironically, the defendants claim the plaintiffs could not possibly have known, and or, relied on the content of such dissemination, while at the same time arguing that the defendants cannot be held liable because over the years everybody knew of the dangers of smoking from other unnamed sources.

Since each of these defendants were acting on behalf of, or in concert with, the other defendants in the case, the jury reasonably could, and apparently did, conclude these defendants were guilty of fraudulent representation, concealment and conspiracy.

The motions for Directed Verdicts as to the Council For Tobacco Research and the Tobacco Institute are DENIED.

Application of Michigan and/or New York Law

This issue has already been decided by Judge Postman in his pre-trial order of January 6th, 1998 and is the law of the case. That order sets the principle that if a plaintiff was in the State of Florida at the time the medical condition was diagnosed and the causal relationship with smoking had manifested itself, and the plaintiff was a resident of Florida at that time, then the law of Florida would apply regardless of the fact that the plaintiff had resided in another State and smoked prior to the diagnosis.

The Motions for Directed Verdicts on the application of Michigan and/or New York law are DENIED.

Motion for Directed Verdict on the issue of Punitive Damages

The jury having heard the evidence submitted during the Phase I trial, definitively determined that the conduct and the behavior of the defendants rose to a level to entitle the plaintiffs to an award of punitive damages. The Court having heard the same testimony and evidence concurs the proofs were clear and convincing.

This motion is DENIED as to ALL defendants

OTHER MOTIONS FILED ON BEHALF OF THE DEFENDANTS MOTIONS IN LIMINE

The defendants in this case have filed numerous other motions, most of which were MOTIONS IN LIMINE or which in some regard related to the presentation of evidence. Most, if not all , were resolved during the evidentiary portion of the trial as the testimony was elicited and were either denied, or sustained in whole or in part or mooted, as the record will reflect, therefore there is no need to rule on those motions here.

MOTIONS FOR MISTRIAL

The Court has carefully considered the Motions for Mistrial in this cause and has determined that curative instructions to the jury, and/or motions to strike have been granted as requested by the movant, for most of the motions, and in any event the cumulative effect of the alleged error, was not in the opinion of the Court, sufficient to have so influenced the jury as to affect the outcome of the case considering the length of the trial, the number of witnesses presented, the quality and quantity of the testimony, the huge amount of documentary evidence, and specifically the substance of the alleged remarks. The jury in this case rendered three verdicts, each based upon a mountain of evidence over a period of two years in three separate trials. The court feels confi-

dent, that although some remarks of counsel may have been uncalled for, or subject to objection, they were not so egregious as to require a new trial. THEREFORE:

All Motions for Mistrial which have been previously deferred or not previously denied, are hereby DENIED.

It should be noted here, that at the close of the Phase II B (punitive damages) trial, the defendants filed a plethora of motions, all outlined in a 190 page motion for New trial or Remittitur, to Set Aside the Verdict and for Entry of Judgement based on previous Motions for Directed Verdicts, Mistrial, and for Decertification.

The Court has already ruled upon the Motions for Directed Verdicts and Mistrials herein, however a review of the voluminous **Motion for New trial** reveals far too many alleged assignments of error for the Court to address on a one on one basis. In fact, the motion ostensibly reviews every objection raised during the entire two year, three phase trial and over 57 thousand pages of transcript. As to each of the objections raised during trial, the Court entered a ruling resolving the issue at the time the objections were made, and sees no reason to reverse itself at this time, nor does the Court feel that just because possibly hundreds of objections were made, that this necessarily resulted in such a cumulative error as to require a new trial. The Court has reviewed the motion and all the alleged errors cited, and has determined that on the merits of each claim, the motion is unsustainable.

Therefore: The Motion for New Trial is DENIED.

This leaves two issues to be resolved by the Court for which the Court feels a comment is appropriate: **Decertification and Remittitur**.

DECERTIFICATION

Although, the 3rd District Court of Appeals and the Florida Supreme Court have already addressed the issue of Certification, approving preliminarily the case to proceed as a class action case, see R.J. Reynolds Tobacco Co.,v. Engle, 672 So.2nd 39 (Fla. 3d DCA 1996) and Review Denied. Fla. S.Ct. Docket No. 88235 10/2/96., the matter is still before the Court for a ruling on Defendants Motion to Decertify, at the close of all the evidence.

This case was divided into separate phases-the first phase was to determine the common issues of liability, causation and entitlement to punitive damages. The second phase was a trial on the claims of three class representatives involving issues of individual compensatory damages, causation and comparative fault. The third phase involved the issue of the amount, if any, of punitive damages in the aggregate.

The jury found for the plaintiffs in all three phases generally, and assessed compensatory damages of over **12 million dollars**, and punitive damages in the neighborhood of **145 billion dollars**.

In assessing whether a case should be classified as a "class action" lawsuit, controversy has arisen in product liability cases as compared to mass tort or accident cases. In product liability cases individual issues often outnumber common issues due to the fact that no single event has brought about the injury complained of, nor is there generally any single proximate cause which applies equally to all potential class members. Moreover, affirmative defenses such as Statutes of Limitation, Statutes of Repose and concepts of reliance etc, may depend on facts peculiar to each plaintiffs case.

The Court in Amchem Products. Inc. v. Windor, 117 S.Ct. 2231, speaking about the 1996 revision of Rule 23 noted the committee opinion that mass tort cases are not ordinarily appropriate for class action, but the text of the rule

does not categorically exclude mass tort cases from class certification. Since the late 1970's, courts have been certifying such cases in increasing numbers. See Resnick, From "Cases" to " Litigation ", 54 Law & Contemp. Prob.5, 17-19 (Summer 1991) (describing trend). (emphasis added).

In trying to determine whether a case should be certified as a class action, a majority of the courts look to three criteria: 1.) tort maturity, 2) efficiency and manageability, and 3) negative value.

TORT MATURITY

Not until torts are classified as "mature" and general causation has become relatively clear, will such cases be candidates for class action treatment. "Manual for Complex Litigation (Third) S 33.26 (1997).

In Costano v. American Tobacco Co. (5th Cir.1996) decertification was based on an "immature tort". That case intended to encompass all potential future tobacco related personal injury claims against the Tobacco Industry, whereas the instant case involves only those who have an immediate disease or condition. It should be noted that this Court has denied the plaintiff's claim for Medical Monitoring precisely to avoid the pitfall of the Castano case and Barnes v. American Tobacco Company, 161 F.3rd. 127 (3rd Cir.1998) The Court refused to allow potential claimants who have not manifested a disease or condition to become a member of the class, therefore this is not an "immature tort" issue.

EFFICIENCY AND MANAGEABILITY

In part, this requirement is designed to evaluate whether the resolution of cases by class action is a viable and judicially economic alternative to individual suits.

The Castano decision to decertify the class action based its ruling on the fact that the lower court has not considered how each claim in the complaint varied under the law of difference states and on the fact that the lower court did not make a finding of whether litigation is manageable in light of

these differences. Id. at 739. The Castano court found that there were "extensive manageability problems" which included "difficult choice of law determinations, sub-classing of eight claims with variations in state law, notice to millions of class members, further sub-classing taking account of transient plaintiffs, and the difficult procedure for determining who is nicotine dependent." Likewise

in Georgine v. Amchem, 83 F.3d 610, 632-33 (3rd Cir. 1996), as well as in Castano, a lack of judicial efficiency also derailed the proposed class.

However the instant case is unlike Georgine or Castano in that, the trial plan has effectively allowed the determination of general issues" en mass", thereby conserving the Court's resources by then only requiring Phase II trials to determine individual issues of liability and entitlement particular to each representative member of the class. In the *Castano* case, the court portended 1) problems involving the manageability issues regarding the notification to a class of millions; 2) sub-classing for transient residents; and 3) problems with superiority requirements due to individual reliance and immaturity of the tort. The Court believes it has successfully addressed and allayed the above concerns of the Castano court.

First, since the immediate class has a much more limited size and involves only Florida residents and Florida law, the Court has been able to effectively notify its potential members without having to concern itself with the variations of state law which were endemic in Castano.

Secondly, unlike Castano, the instant case involves a much smaller population, involving only residents of Florida who had manifested a disease or made a causal connection thereto. Because Florida law is the only law to be applied to determine the rights and liabilities of the parties with respect to the instant action, this Court has been able to create a touchstone which will help determine the "choice of law"

analysis for the Plaintiff class, thus the shortcomings of the Castano case in regard to transient residents has been successfully avoided in the instant case. See infra Engle Class Order dated January, 1998.

Thirdly, and again unlike the *Castano* court which based its decision to decertify on the assumption that at the time of decertification individual reliance may come to undermine the superiority requirement for maintaining a class action, the instant action has successfully avoided the problems associated with reliance in class action suits. Although Florida courts have an aversion to class action treatment for breach of contract or fraud claims, it is in limited circumstances, appropriate for class action. See Lance v. Wade, 457 So.2d 1008 (Fla.1984); see also Broin v. Philip Morris Companies, Inc., 641 So.2d 288.

In addition, since fraud has been shown by the Plaintiffs to be a result of deception and artifice, fraud may, under Florida law, be based upon an omission or non-disclosure. See Taylor v. American Honda Motor Co., Inc., 555 F.Supp.59 (M.D.Fla.1983). In such instances, the courts have recognized that a fraud class action based on an omission or non-disclosure is appropriate for class actions.

As such, the issue of superiority vis a vis individual reliance is no longer dispositive, as several courts, in similarly situated cases involving omission or non-disclosure, have found that reliance is not an obstacle to class action. See Keyser v. Commonwealth National Financial Corp. 121 F.R.D. 642 (M.D.Pa. 1988).

At the close of Defendants' case, it has become apparent to this Court that class action treatment is superior to pursuing this matter by individual claims. If Plaintiffs were required to try their cases individually, issues such as reliance, causation, defendants knowledge, intent, or reckless disregard, and defendants' financial capacity, etc., will have to be litigated many of thousands of times. This is more than mere

speculation. After having sat through the enormous complexities involved in this trial, it is self-evident that any trial would have to involve similar proceedings. And if there were to be individual trials, it is inevitable that the common issues of Defendants' conduct would become a predominant aspect of each trial, which could result in conflicting verdicts thus proving that common issues become the most prominent aspect of this case.

The closest parallel this Court can find to the instant case is asbestos litigation, which is undoubtably one of the most complex of all mass tort litigation. See Ahern v. Fireboard Corporation, 162 F.R.D. 505, 528 (the primary factual and legal issues such as disease causation, product, situs and defendant identification and standard of care have been identified and developed through extensive litigation; despite the maturity of asbestos litigation, it continues to be expensive, time-consuming, and complex.) The same can be said for tobacco litigation since it also has fully developed and resolved issues, and is subject to extensive litigation, thereby, contributing to the delay, high transaction costs, and arbitrary results that have become such a burden to the judicial system, (and providing further argument for the need to resolve these issues through class action litigation).

The Court is also aware that there exist legitimate Seventh Amendment concerns when a multi-phase trial involves separate and distinct issues of general and specific causation. However, the trial plan clearly limited general causation issues to Phase I and there was little to no risk that such issues would be revisited in any subsequent phases. See In re: Dow Corning Corporation, 211 B .R. 545 (E.D. Mich.1997) (In that case the trial court held in regard to separate trial for general causation, the VII Amendment would be a concern if a specific causation/damage jury revisited the issue of general causation in its deliberations. However, experienced trial judges in conjunction with parties could overcome that pitfall through careful controls over trial processes, and could

minimize the danger of allowing a second jury to re-examine findings of first jury).

Likewise, in Cimino v. Raymark Industries, Inc. 151 F.3d 297 (5th Cir.1998), the court approved a trial plan that adequately individualized and preserved the Seventh Amendment rights with respect to each individual's actual damages from an asbestos-related disease. Although that court ultimately held that the use of "extrapolation plaintiffs" in that case violated the VII Amendment, the court did find that such a plan can constitutionally divide general and specific causation. See also Jenkins v. Raymark Inds. Inc., 782 F.2d 468 (5th Cir.1986), (justifying class trial of common issues and individual trials of individual issues of exposure - causation and damages).

Several courts involving matters other than asbestosis have also allowed the separation of general and specific causation. For example in Sterling v. Velsicol Chemical Corp. 855 F.2d 1188, 1200 (6th Cir.1988), a personal injury suit by individuals living in the neighborhood of a landfill allegedly contaminated by defendant, the Sixth Circuit noted that

> "the [trial] court, as is appropriate in this type of mass tort class action litigation, divided its causation analysis into two parts. It was first established that Velsicol was responsible for the contamination and that the particular contaminants were capable of producing injuries of the types allegedly suffered by the plaintiffs. Up to this point in the proceeding, the five representative plaintiffs were acting primarily in their representative capacity to the class as a whole. This enabled the court the determine a kind of generic causation-whether the combination of the chemical contaminants and the plaintiffs' exposure to them had the capacity to cause the harm alleged. This still left the matter of individual proximate cause to be determined. Although such generic and individual causation may appear to be inextricably

> intertwined, the procedural device of the class action permitted the court initially to assess the defendant's potential liability for its conduct without regard to the individual components of each plaintiff's injuries. However, from this point forward, it became the responsibility of each individual plaintiff to show that his or her specific injuries damages were proximately caused by ingestion or otherwise using the contaminated water".

See also Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1229, 1234 (9th Cir.1996) (in certifying Fed R. Civ P. 23(b)(3) as a class in prescription drug products liability suit, the district court "specifically excluded the individual issues of proximate causation, and compensatory damages";).(Class certification reversed on other grounds, but Fed R. Civ P. 23(c)(4)(A) exclusion of individual issues, essentially approved). See also Watson v. Shell Oil Co., 979 F.2d 1014 (5th Cir.1992) (panel affirmed trial plan for determination of liability and punitive damages to be followed by trials on individual issues).

Given the above reasoning, this Court held that in Phase I, the jury was required to determine, among other issues:, 1) whether smoking cigarettes caused the disease(s) in question, 2) resolve general issues of causation, 3) determine the extent of the defendants wrongful conduct, and 4) determine entitlement to punitive damages. The jury returned verdicts in favor of the plaintiff on all those issues., The same jury in Phase IIA was then asked to: among other issues, 1) determine individual issues of causation for the class representatives, and, 2) determine the representative class members compensatory damages. Again, the jury returned verdicts favorable to the plaintiffs. In Phase IIB, the jury was required to determine the amount of punitive damages to be award in the aggregate against all defendants. The jury, after hearing two years of trial in three stages, returned a multi-billion dollar punitive damage award.

In Phase III, the individual claims of the class members will be tried before different judges and different juries to determine whether the injuries complained of were the result of cigarette smoking or from other causes, and what if any, damages resulted from that activity. The Juries in Phase III will not be concerned with the general causation issues of the previous trials, nor the conduct or behavior of the defendants, or punitive damages, those issues have already been resolved, and subsequent juries may be so instructed.

The Defendants would be permitted to introduce evidence limited to the specifics of the individual plaintiff's circumstances. For example, the Defendants would be permitted to show that the plaintiff has a genetic pre-disposition to the disease, that s/he smoked cigarettes for too short a period of time for symptoms to have been caused by smoking cigarettes, or that the disease was caused by some other activity etc. Future Courts and Judges can, by skillful control of their cases, eliminate the danger of allowing a second jury to re-examine the findings of common issues determined by the first jury in Phases I, IIA and IIB

Parenthetically, the Court is also aware of the due process problems associated with findings of liability for class actions of unspecified size. The Court feels that a statistical finding of the class size preserves the Defendants' due process rights while at the same time preserving Plaintiff's individual rights to trial. Thus any claimants' rights are preserved through this action which otherwise would have precluded tort claimants for their day in court and many claimants who would never live to see their cause litigated nor have the opportunity to receive compensation have had an opportunity for redress.

NEGATIVE VALUE

Finally, we address the issue of whether the case is a "negative value" suit. Negative value suits "permit the plaintiffs to pool claims which would be uneconomical to litigate

individually." See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809. 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985); see also Rhone-Poulenc, 51 F.3d 1293 (7th Cir.1995). Thus since issue of negative value does not inure to either Defendants or Plaintiffs in the instant action, the Court will not find it to be dispositive as to the superiority question. See also Ruiz v. American Tobacco Company, 180 F.R.D. 194.

CONCLUSIONS REGARDING DECERTIFICATION

For the reasons above, the Court record establishes in a clear fashion that there has been resolution of the problems concerning immaturity of tort, efficiency and manageability, and negative value. Thus, decertification is inappropriate in the instant action. The class certification and trial plan calling for trifurcation of the issues is the preferred option in this case.

Therefore: The Motion To Decertify The Class is - DENIED

REMITTITUR

The issue of Remittitur has been reserved for last because it was last in the scheme of things during the trial.

The case as has been stated above, was tried in three stages, the last being a punitive damage phase. The jury returned a multi-billion dollar verdict against the defendants to wit:

Philip Morris, Incorporate	$ 73,960,000,000
RJ Reynolds Tobacco Company ----	$ 36,280,000,000
Brown & Williamson Tobacco -----	$ 17,590,000,000
Corporation, individually and as successor by merger to the American Tobacco Company.	
Lorillard Tobacco Company/--------	$ 16,250,000,000
Lorillard, Inc.	
Liggett Group Inc,/Brooke Group --	$ 790,000,000

Holding, Inc.

Council For Tobacco Research------ $ 1,105,210

Tobacco Institute- ---------- $ 278,339

The defendants have attacked the jury verdict as excessive and unreasonable and have asked for a new trial or in the alternative, a remittitur.

A remittitur is generally controlled by the principle of whether the manifest weight of the evidence shows that the amount of punitive damages assessed is out of all reasonable proportion to the malice, outrage, or wantonness of the tortious conduct. Arab Termite and Pest Control Of Florida, Inc., et al., v Jenkins Fla., 409 So 2nd 1039 (S.Ct.1982). In addition thereto, it must be determined whether the award is out of proportion to the defendants net worth or ability to pay without going into bankruptcy or going out of business. see: Bould v. Touchette, 349 So 2nd 1181, and Jones v. Greely, 25 Fla. 629, 6 So 448 (1889).

The "reasonable proportion" controlling in this type of case must, of course, be affirmatively supported by the record, or the judge must find that the jury was influenced by matters outside the record. (Arab Termite supra). Another consideration is the meaning and effect of the term "net worth" as it relates to the imposition of punitive damages. Although net worth can simply be stated as the end result of comparing assets against liabilities, it is not the end-all when determining an award of punitive damages. The jury has the right to determine, when deciding punitive damages, the "financial resources" of a defendant see:. Florida standard Jury Instructions (Civ) subparagraph (2) PD 1b (2). Therefore, "net worth' is only one factor in determining the "financial resources" of a defendant.

Before going further, the court feels it necessary dispose of the issue of "outside influence". The Court has determined that there is **no evidence** that the jury in this case was influenced by any matters outside the record. In fact the

Court took special pains to instruct the jury on a daily basis about reading anything, seeing anything or listening to anything from any source whatsoever, be it radio, T.V., newspapers, magazines, the internet or conversation with others, that might have anything to do with the issues or subject matter in this case, and /or which might influence their verdict. The jury was told they must return a verdict based solely on the evidence and testimony adduced in court and on the instructions from the court and from no other source. The jurors were interrogated each day of trial by the Court, (the parties also had equal opportunity to question the jury), as to compliance with this instruction. After carefully evaluating the jury and their responses to the Court's inquiry, the Court is well satisfied that the jury was **NOT** influenced by any matters outside the record. **Nor**, in this Courts opinion, was the jury **unduly** influenced by matters **even experienced at trial.**

This then leaves the issues of whether the punitive damage award is out of proportion to the defendants conduct, or the defendants ability to pay, or both.

CONDUCT OF THE DEFENDANTS

The first major issue to be discussed is whether the ***conduct or behavior of the defendants*** warrants the $144.08 billion dollar punitive damage award, and whether the award "shocked the conscience of the Court," and therefore, whether a remittitur should issue.!!

This Court sat through two years of trial, listened to over 150 witnesses, heard over 57 thousand pages of testimony and conducted hundreds of hearings on legal and evidentiary issues in addition to becoming familiar with the complexity of the issues from the very inception of the filing of the complaint in 1994. The Court truly believes it has more of an understanding of the case than any nonparticipant, and is in a better position to render such a judgement. Remember, the

issues in this case go back to the 30's, 40's and 50's — seventy years or more of conduct by the defendants which led to the complaint in 1994 and which on some issues, continues to the present. That is what makes this case so unusual and unique.

At first blush, a $144 **BILLION** dollar punitive damage award seems so far outside the comprehension of any reasonably thinking person that one would immediately say it is shocking and not in keeping with rational thought. However, keep in mind the enormity of the seventy years of behavior and the almost incomprehensible damage that was done to such a huge number of people. There has been testimony in this case that 400 thousand people have died each year from the ill effects of smoking tobacco products, and hundreds of thousands of people contracted diseases and suffered, and still suffer, the horrible effects of those diseases. The enormity of the damage is mind boggling, as is the realization that the ill effects of tobacco smoking was known as far back as the turn of the century!. Health official for years struggled with the concept of causation and sought through the scientific world to bring the matter to the attention of the public. The tobacco industry fought them at every turn, decrying the concept of causation and rallying behind the defense of "free choice".

The proof of the pudding, as it were, was in the fact that back in 1953 Dr. Wynder with his mouse painting studies, announced to the public, a link between smoking and cancer. This led to the formation of the "Tobacco Institute Research Committee (TIRC), [later known as the Council for Tobacco Research (CTR)] by the tobacco industry which then resulted in what has been known as the "Frank Statement" in 1954. This was a statement published in 400 newspapers aimed at 43 million Americans, explaining that the tobacco industry recognized the dangers involved in smoking tobacco, and pledged to conduct a concerted research effort to develop a safer product, and to keep the public informed of its research

results. The major tobacco companies of the day (the defendants in this case) all signed off on the document (with the exception of Liggett.). TIRC meanwhile, acting as a public relations arm of the tobacco industry, engaged in a concerted effort to refute any claims of health dangers as a result of smoking. A publication called "Tobacco and Health Research" was created to disseminate false and misleading information regarding the issue of causation. Although the defendant tobacco companies had promised full public disclosure of it's findings and research, the defendants, via The Council For Tobacco Research, suppressed reports and attacked research. In 1954, Liggett & Meyers, as it was known then, hired Arthur Little to duplicate Dr. Wynders skin painting tests and he got the same or similar results-but those results were never made public by the defendants.

During the ensuing years, the tobacco industry and the defendants became aware that tobacco smoke contained over 4,000 compounds, and over 40 carcinogens but did not reveal that information to the general public. In fact, the defendants knew about the addictive nature of nicotine as early as the 60's, and in 1972 in a Philip Morris report at a CTR conference a statement was made "without nicotine there would be no smoking" . . . and . . . "cigarettes are a dispenser for a dose of nicotine".

As a matter of fact, tobacco scientists learned how to manipulate the levels of nicotine in cigarettes by adding ammonia to produce a "freebasing" nicotine which speeded up and enhanced the effect of nicotine on the brain. They also were able to develop the Y-1 strain of a high nicotine content tobacco plant grown in a foreign country In addition, company scientists were able to devise ways of manipulating tar and nicotine content in cigarettes thus lulling the public into believing there was a "safer" cigarette.

Evidence existed regarding the conspiracy and fraud activities of the companies in the form of a so called "Gentlemens Agreement" not to do independent research., with

the idea of suppressing unwanted or damaging research results. Also, under some circumstances, research results were sent to company offices over-seas in order to prevent discovery.

Another problem area was the setting up of the "Special Project" unit of CTR, in which attorneys either controlled or had a say in determining which research projects would be undertaken and by whom. The way it was structured allowed the companies to claim an attorney-client privilege whenever necessary. Comment was made on this very subject by Federal Judge Sarokin in Haines v. Liggett Group, Inc 140 F.R.D. 681 D.N.J.1992 who said defendants used the attorney- client privilege to hide documents-never intending to give full disclosure, and he called it a fraud to mislead the public Judge Sarokin also said in that opinion ". . the tobacco industry may be the king of concealment and disinformation" In conjunction with CTR, the defendants established the "Tobacco Institute" and used it as a lobbying arm with government agencies to advance certain position strategies such as the "multi-factorial hypothesis", and the "genetic" defense, to counter-act the series of Surgeon General's Reports, and the studies of the scientific community.

The record also reflects that in 1994, the C.E.O's. of the defendant companies went before congress and swore under oath that cigarettes and /or nicotine was not addictive, even though there was evidence as far back as the 60's to the contrary. That position was also voiced by the Vice President of the Tobacco Institute Brennan Dawson in 1994 who said cigarettes are not addictive, nor has it been established scientifically that smoking cigarettes was harmful to health. Dr. Alexander Spears of Lorillard denied before congress that the defendants manipulated nicotine levels. Charles Whitley of Tl echoed that denial. However, in 1981,Dr Spears in an article for the 3rd Tobacco Chemists Research Conference had discussed manipulating nicotine levels. The defendants continued to claim that there is no proof that cigarettes cause

harm. This, in face of the many Surgeon Generals reports and other scientific evidence, over several decades, that spelled out the harm caused by smoking, specifically lung cancer and a long list of other diseases. Throughout the decades since the "Frank Statement", the evidence revealed that the tobacco industry, specifically these defendants, have followed a line of telling the public that there is no scientific proof of "causation" and no verified link between smoking and disease, when their own research proved otherwise.

Evidence at trial was replete with the history of denials by the defendants about the health effects of tobacco. Trial evidence outlined the techniques of billion dollar advertising campaigns to sell their products to the public in general and youth in particular. Many documents from the defendant's files revealed reports, conferences, discussion and memo's dealing with youth and gender marketing and strategies to deny such practices..

Over-all, the entire two year trial record was full of examples of deceit, denials contrary to research results, efforts to conceal or suppress information, collusion among defendants to insulate themselves collectively from public and the scientific and public health communities criticism of the industry, and either outright misrepresentation, or failure to acknowledge that which was proven and obvious.

As a result of years and years of such activity, the public was led astray and confused by the seeming conflict in the evidence about the harmful effect of tobacco, and kept in ignorance about the addictive nature of nicotine, and suffered untold misery and harm, including death, from the diseases, i.e.: cancer, emphysema, heart and circulatory problems, etc, all resulting from the use of the product.

If one really examined the entire record in detail of the decades of abuses committed by the defendants upon an ill informed and unsuspecting public, one could say it was that concerted behavior on the part of the Defendants, over so

many years, affecting so many people, that **"shocks the conscience of the Court", not the award itself.**

In Phase I of the trial, the jury, having heard the testimony concerning the behavior and conduct of the defendants, decided that punitive damages were indeed appropriate in this case, and in Phase IIA the jury set those punitive damages as outlined herein.

Therefore:

As to the first issue — *behavior of the defendants*—, this Court has no problem accepting the rational of the jury who heard all the evidence, that the award is warranted because of the behavior of the defendants. In other words, the Conscience of the Court is **NOT SHOCKED** either by the fact that an award was made, nor by the amount of the award rendered by the jury considering the scope of the behavior of the defendants, and the number of people affected thereby.

ABILITY TO PAY

THE PLAINTIFFS POSITION

Dealing next with the issue of ***ability to pay***, the testimony on the plaintiffs side came from two experts who testified about the "financial worth" of each of the defendants, utilizing certain criteria they felt were in compliance with generally accepted standards of persons who evaluate businesses. Although there was controversy about the method used to make the calculations, Mr. Cherner testified that based on a projected figure that one percent of market share was worth $1.5 billion, then each defendants "worth" can be calculated by the percentage of market share attributable to that defendant. Those calculations resulted in the following: (estimated values).

	MARKET SHARE %	MARKET SHARE VALUE $
Phillip Morris	49.3	73.95B

R.J.Reynolds..... 24.12 ..... 36.18B

Brown & Williamson 14.0 ..... 21.B

Lorillard..... 10.7 ..... 16.05B

Liggett ..... 1.2 ..... 1.8B

In addition to the above, the plaintiffs experts opined that net worth is not an accurate measure of a company's value. Net worth is reflected in a balance sheet, sometimes called book value, but the true worth of a company is based on net worth(book value/ balance sheet), plus intangibles, which in this case includes good will and trademark. In that event, the resulting values as calculated by the testimony, are fairly close to the figures above: (Philip Morris .$80B, RJR..$36B, B & W..$22B, Lorillard.. $17B, and Liggett.. $1.8B.).

JOSEPH CHERNER

Plaintiffs expert Mr. Cherner indicated that his calculations are based on the only available comparables in the industry-the purchase by Philip Morris of 3 Liggett brands, which he then used to extrapolate the value of the other defendant companies. He therefore opined that since this was a Philip Morris estimate of another tobacco companies brand worth, therefore it is a more accurate indication of true worth of a company.($300 M for .2% of 1% of market share, which makes each 1% of market share worth $1.5 billion) see chart above..

Mr. Cherner, in his testimony made several points . He said, for example, that RJR net worth is not the true value of the company -it is only stockholders equity, and RJR's worth is $37.5 B or 5 times what RJR reports on it's 10K. He said according to the way Philip Morris determined value in the purchase of the Liggett brands, Philip Morris brands are valued at $75 Billion, and RJR is worth $37.5 billion, and he would use the same formula to value B & W and Lorillard, because Philip Morris would be in a better position to know

better than anyone in the world what cigarette brands are worth. He also said that when Philip Morris valued its own brands at $75B it is valuing its brands including the legal liability it faces from this day forward.

Mr. Cherner also said that the defendants, in order to pay the $250 billion MSA/FSA obligation, simply raised prices 4.5 cents a cigarette and generated $21 billion, and if by raising prices there was a decrease in consumption by 10%, they would still raise $19 billion per year forever.

In another opinion, Mr. Cherner testified that Lorillard's valuation of market share would most likely be identical, and if not very similar, to Philip Morris's valuation of market share to-wit,:$15-16 billion dollars, even taking into account adjustments for assets and liabilities.

He also said that although Lorillard does not have $15 B in the bank, that does not mean by any stretch of the imagination, that Lorillard cannot take place in a punitive damage award that collectively would come to $250 Or $300 billion.

As for the M.S.A. § and the FSA, Mr. Cherner agrees that the $250 billion is to be paid out over a period of years-however he also acknowledges that the defendants have been able to make payments of up to $10 billion dollars or more, adjusted for inflation, per year since the institution of the "Agreements".

When asked by the defense about how much Philip Morris can pay in punitive damages, Mr. Cherner said since Philip Morris has 50% of the market share, it should pay 50% of the punitive damage award.

With reference to RJR, Mr. Cherner said there is a confusion about calling shareholder equity net worth. If assets were valued at market prices and the liabilities were valued at market prices, then shareholder equity may mean the same thing as net worth, however very often assets are not valued at market level — for example one may have a building valued on the books for one million dollars, that is presently

worth $100 million, but still the book shows a value of only one million. So most often, assets minus liabilities does not equal stockholders equity. Mr. Cherner also said that it is misleading to the jury to say that RJR has a net worth of $7 billion dollars. It implies that is the value of the company, but it is not. It is the stockholders equity figure and is not net worth.

In regard to Liggett, under cross examination, Mr. Cherner opined that with reference to the M.S.A. § and the FSA and the ability of the defendants to raise $20 billion dollars a year in extra income by increasing prices, . . .", this amounts to a present value of between a $200 billion and a $400 billion dollar settlement. So if we're trying to value what $20 billion dollars a year would be worth in a punitive damage award, it would be worth a present value of an award of anywhere between $200 billion and $400 billion dollars. That's what a punitive damage would be worth under that scenario. He also said he was aware that Liggett has paid zero or a negligible amount under the MSA.

Concerning Brown and Williamson, Mr. Cherner said B & W was the only one of the defendants that was not doing well after the MSA-losing some market share from about 14% to around 11.6% currently. B & W operating income has also declined but still shows a net income of $215 million.. He also was unaware that B & W has received a negative one billion rating from organization such as Smith Barney or Credit Suisse.

PROFESSOR GEORGE MUNDSTOCK

The other plaintiffs expert, Professor Mundstock in essence echoed Mr. Cherners views on whether financial statements reflect true value. He said there are three types of financial statements-an asset account, a liability account and a equity account. A balance sheet is just a snapshot in time and does not represent an appraisal or evaluation. Intangibles

go into determining overall value-this is called intangible value -such as trademarks. Most of the time intangibles are not listed in the books. Generally speaking book value therefore, does not necessarily reflect market value.

He also said there is such a concept as market capitalization-the value of what a company thinks its stock is worth, however, the stock market value of the company doesn't fully reflect their ability to pay.

The real value of a business to an owner, he said, is the value of the cash they can pull out of a business and still keep going, and then figure out at currant interest rates, what that future cash is worth that's called capitalized earnings approach or present value approach or discounted earning approach. Prof. Mundstock said he used this type of approach because he did not have adequate comparables to work with. According to Prof. Mundstock, because there were no comparables he could work with, he took his best guess of what kinds of excess cash the business would throw off;: figured out what someone be willing to pay for that cash today and said that must be what the business is worth. He said he made those calculations based on information provided during the trial and reviewed some tax returns.

As regards Philip Morris, Professor said the parent company Philip Morris Companies inc, has several subsidiaries, one is called Philip Morris USA, another is called Philip Morris International.. Philip Morris stock which is traded on the stock exchange is held by the parent Philip Morris Companies Inc. The problem is then, how to value Philip Morris USA? According to Prof. Mundstock, a good part of Philip Morris USA profitability is because it owns some famous trademarks such as Marlboro, and Marlboro is sold internationally, and advertising in the USA sells Marlboro Internationally, and vice-versa-a sort of synergy exists with the sister corporation Philip Morris International which affects the value of Philip Morris USA. In his mind, Prof Mundstock said, to ignore the fact that Marlboro is a multi-national

trademark in a related corporation is to ignore the tremendous value of Philip Morris' worldwide business and the tremendous value they have in the U.S. because Marlboro is an internationally promoted and marketed product.

Because it was almost impossible to separate out Philip Morris USA from the whole picture, Prof. Mundstock said he used the cash flow method and Philip Morris's numbers, not on the separate company, but using the numbers Philip Morris allocated to tobacco on their public statement, he evaluated their tobacco business and came up with the figure of $118.5 billion dollars for the tobacco business of Philip Morris Companies Inc. He said he, kept in mind the ability of the parent corporation's to generate future excess cash flow, and then he figured the present value.

Referring to net sales of the defendant tobacco companies since the master settlement Agreement, Prof. Mundstock said the defendants sold between 435 billion and 475 billion cigarettes and raised the price by about 4.5 cents a cigarette. Therefore as far as net sales are concerned the figures show in 1999, Philip Morris net sales were up 28%-RJR net sales up 32.4%-B & W net sales up 19.4%-Lorillards market share increased 15%, and Liggetts operating income was up 41%. In the first part of 2000, both Philip Morris and RJR was ahead of 1999. The reason he said, is that the price went up more than consumption went down.

Professor Mundstock, then explained the meaning of "leveraged buyout" saying a company can buy out another company using money borrowed from a bank or sometimes multiple sources based on the value of the purchased company.

In addition to the above, using a standard of Philip Morris's purchase of the three Liggett brands , Professor Mundstock calculated the market share of the defendant companies and assigned a monetary value to the companies and came up with figures closely matching those found by Mr. Cherner.

Again, Prof. Mundstock said in order to determine the value of a company you must add the value of the intangibles to the "book" value to get a true value.

On cross examination, Prof. Mundstock said Philip Morris USA value of $6.4 billion dollars on its financial statement is its "book net worth" or stockholders equity. He also said his evaluation of $118.4 billion dollars is for Philip Morris USA and Philip Morris International combined (the tobacco business of Philip Morris), and represents what those businesses could be sold for today.

He also admits he has never been paid to evaluate a business, other than for tax purposes. He is not a CPA. or an economist, nor does he have a MBA.

Prof. Mundstock admits the defendants don't have on hand, the amount of money he valued the companies at, but he said, they could borrow the money, probably over a 6 month period, in the capital market.

As to how he reached the figure of $118.4 billion for Philip Morris tobacco business, Prof. Mundstock said he based it on present value of future excess cash, and that is based on the condition of the company in 1999 being fairly stable for the future years. He also said the cost of future litigation would directly impact future excess cash, as would sales and regulations. In making his calculations he did not take into consideration the size of the Engle class, nor the projected size of any compensatory award

Philip Morris's income statement shows for the year ending 1999, the net earnings, or profit reported was $ 2.99 billion dollars-40 times less than the $118.4 billion dollars figure used earlier, but that $118.4 billion is spread over 25 years, according to Prof. Mundstock.

Professor Mundstock when questioned about the two methods of evaluating business said he preferred the valuing of trademarks plus book value over valuing by trademark

value alone (the Philip Morris-Liggett deal) — but he did both just as a check.

As to Brown and Williamson, he does not agree with B & W figures showing that B & W is in poor financial condition-income was up 20% in 1999 from 1998 because they raised prices to meet the M.S.A. obligation. He did admit that B & W market share was down by one or two percentage points, but also said there has not been any negative analysts reports since the FSA for B & W. In fact the analysts reports since the FSA have predicted a 2 or 3 % growth in the industry adjusted for inflation-this would offset any loss of 2-3 percentage points in the last year. Decreasing profits would portend trouble unless you are measuring profits using financial accounting numbers.. Professor Mundstock said he realizes that dealing with competition in either premium brands or generic could affect the ability to raise prices and therefore market share would suffer — but he also said he would rather have 1% of a very profitable market, than 100% of market share for a product that doesn't sell. He also said his previous calculation of B & W's worth at $9.9 billion dollars was wrong and it is actually $22 billion.

Considering Lorillard, Prof. Mundstock points out that Lorillard on their financial statements shows the obligations to the M.S.A. as they are due, which is proper — but they also show the companies other obligations, even thought they are not due.

It is important to note here that when questioned on cross examination, Professor Mundstock said using the method he feels more comfortable with, book value plus intangibles, the value of Lorillard would be about $12.5 billion rather than the 16 billion using the market share method of Mr. Cherner. He also agreed that according to Lorillards figures their shareholder equity is around $921 million. In order to raise $12.5 they would have to sell off an interest in the equity of the assets since they don't own any stocks. His best guestimate is Lorillard could raise $10 Billion (adjusting the

$12.5 Billion equity for commission and expenses) by borrowing against, or selling the equity interest. Professor Mundstock also said that if it was structured as a sale, then Lorillard would be out of business.

Regarding RJR on cross examination, Professor Mundstock said, he previously testified that using the market share method, he would value RJR at $36 billion dollars, but by using the method he prefers, the value would be $19.6 Billion. The assets verses liability snapshot on the financial statement is not truly reflective of the company's financial picture. RJR sold off Japan tobacco and paid off billions in debt, but also bought back billions of their own stock without having to pay dividends. Currently, Prof. Mundstock agreed that after paying out all that money RJR no longer had a cushion and this was reflected in a currant ratio of less than 1 which is a low ratio and means the company is not very liquid in the short term.

Professor Mundstock did say when questioned, that if RJR would be required to pay $36 billion today, it would be out of business., or for that matter $19.6 Billion.

Regarding Liggett, Prof. Mundstock valued Liggett at $1.8 billion but said under the more preferred method the value would be $.9 billion. He also said that because Liggett has changed so much after the sale of three of its brands to Philip Morris, it was hard to figure what the future for Liggett will be. Although Liggetts books show cash or cash equivalent on hand to be less than $3 million, and currant assets to be about $81 million, Prof. Mundstock opined that in an industry that generates the kind of cash flow that the tobacco industry can generate, low numbers of cash on hand are less telling indicators of a company liquidity. He also said that even if a parent company of Liggett has outstanding some senior priority notes, those notes don't pledge Liggetts assets, only the parents stock, which doesn't affects Liggetts ability to go to the financial market for a loan. He also notes that even if Liggetts market share is down from 2.5% in 1995

to 1.2% in 1999, and unit volume has decreased by 50% from 1995 to 1999 to 5.2 billion cigarettes sold, Liggetts operating income is up 40%.

On Re-direct examination Professor Mundstock said that a company like Philip Morris which claims to have a net worth of $6.4 billion, but can pay $368 Billion in a proposed settlement agreement, can do so is for two reasons: one — the $6.4 billion is not their true value, and two because the payment are over time. These companies are cash cows, he said, and can throw off considerable cash flow over a period of time. They pride themselves on their cash flow and ability to generate cash.

Plaintiff experts also offered an opinion regarding ability to pay, saying that if the tobacco companies originally offered the U.S. Government 367 Billion dollars in a settlement in 1997, (which was rejected), and then, in 1998 agreed to pay the Master Settlement Agreement 250 Billion, even if over a period of years, this is an indicator of, at the very least, a present ability to pay a considerable amount against a punitive damage award. It was noted that the defendant tobacco companies ,under the M.S.A. agreed to pay approximately 20 Billion dollars a year over the next 25 years or so, and in order to make those payments, the companies raised the price of cigarettes approximately $1 a pack. Considering the defendants sell about 20 billion packs a year, this can amount to about 20 Billion dollars each year!!...most of the money, according to the testimony, therefore has come from the pocket of the consumer, and not from the pocket of the defendants.

THE DEFENDANTS' POSITION

On the defense side of the case it is interesting to note that none of the defendants produce an "expert" witness. The Court would have welcomed and indeed, would have valued the opinions of a defendants financial expert, and/or corporate financial officer. This would have been a great help in

resolving, not only for the Court, but also the Jury, the financial condition of the various defendants companies. However, the defendants relied instead, upon the testimony of the company C.E.O to discuss the company's financial position.

The following is a summary of that testimony.

MICHAEL SZYMANCZYK (Philip Morris)

Michael Szymanczyk, C.E.O. of Philip Morris basically testified that Philip Morris could not pay $127 Billion to the State on a settlement date in a single payment — that's why they had to raise prices to make the long term payment.. He claims that Philip Morris made $41 billion in the last 25 years, but will have to pay the settlement $93 billion in the next 25 years. According to him Philip Morris's net worth is $6.4 billion and if they had to pay that amount in punitive damages, the company would be out of business. Mr. Szymanczyk said valuing Philip Morris at $75 billion is wrong — it is more like $3.75 Billion. If someone offered $75 billion to buy Philip Morris, he would recommend the board of directors to accept the deal. He also said that to properly value a company one has to consider potential litigation liabilities which in the case of Philip Morris is quite substantial, and that would offset potential earnings. Philip Morris, he said, tried but could not borrow any significant amount of money. He did admit the future outlook is good for the company. He further said currant net worth of the company reflects the value of the Marlboro trademark because it reflects earning that come from that trademark.

NICK BROOKS (B & W)

Mr. Nick Brooks, C.E.O. of Brown and Williamson Tobacco Co, testified about B & W's financial condition and said the company's net worth was $642 million, and has a market share of slightly under 12%. Lorillard has about 10%, RJR about 22 or 23%, and Philip Morris about 50 or

52% of market share. He also said that while B & W had a 12% market share, it only has 6% of the industry profit. Mr. Brooks said that B & W has been hurt more by the M.S.A. and FSA than the other manufacturers. So far B & W has, according to Mr. Brooks, paid out $2.1 Billion in payments under the settlements. In discussing B & W's financial condition since 1996, Mr. Brooks said they made a profit of $295 million in 1996, $10 million in 1997, registered a loss of $482 million in 1998, and in 1999 realized a profit of $216 million. In the last 4 years Mr. Brooks said the company made only 1cent per pack sold. Under the FSA, B & W lost 17cents a pack because of the way Florida calculates their rate of payment. Currently, according to Mr. Brooks, the economic picture shows a gradual decline for B & W in market share. As to industry profits, Mr. Brooks testified that B & W has 6%, Lorillard 14%, RJR 17% and Philip Morris 63%.

When asked by defense counsel whether B & W could continue to raise prices to pay for significant punitive damages, Mr. Brooks replied "clearly not"-.that would accelerate the businesses decline. In fact he said the company had to lower prices to be competitive. On the issue of company valuation, Mr. Brooks said two entities, Morgan Stanley Dean Witter and Credit Suisse attempted to value the company and Morgan Stanley found a negative value of one billion dollars, and Credit Suisse found and even higher negative value. There also was a negative report from a Dutch firm ABN-Amro, which said B & W was declining because of competition and could face bankruptcy by the year 2012. On cross examination Mr. Brooks said the company is faced with "hundreds or thousands" of lawsuits but to date has not paid a dime to a single plaintiff.

Mr. Brooks says the value of B & W today reflected on its net worth statement is $894 million. He does say that there are other ways of determining the value of a company other than assets minus liabilities-for example a future cash

flow method. According to Mr. Brooks, if B & W loses 1.5 to 2 points additional share points, the company would go "under water".

Mr. Brooks also said that B & W has $2.4 billion due from affiliates with currant liabilities of $1.9 billion. B & W also has a credit-borrowing arrangement with BATUS Holding company which owes B & W $1.2 Billion coupled with $678 Million owed to B & W from foreign affiliates.

B.A.T. (British American Tobacco Co.), according to Mr. Brooks made two capital contributions to B & W — one in 1994 to support the purchase by B & W of American Tobacco CO, (about $1 billion) and another to allow B & W to enter the M.S.A. (about $459 million). That capital investment is not like a loan and doesn't have to be paid back, Brooks said, but B & W has to pay dividends on the funds. Mr. Brooks also said it was unlikely that B.A.T. would help finance a punitive damage claim-and said B & W has only $25 million in cash

ANDREW SCHINDLER (RJR)

Mr. Schindler testified that over the last 16 years RJR has raised prices $2.50-$2.75 per thousand, but in 1998 the price increase was $21 per thousand . He said RJR has shown a decline of 36% in volume from 1990 to 1999 . For example he said the decline in volume from 1996 to 1999 was from 119 billion cigarettes to 96 billion.. He expects a further decline in 2000 of between 2% and 4%. As to market share, RJR had 26.9% in 1996-and so far in 2000, 23.5%. A share point represents about 4 billion cigarettes. Mr. Shindler said that there are no funds available to pay for the M.S.A. or FSA obligations therefore RJR had to raise prices.

He said with reference to the balance sheet, RJR showed currant assets at the end of last year or $2.468 billion, and liabilities of $3.068 billion, and cash on hand of $600 million. RJR, also lists good will at $7.563 billion but claims they

cannot sell off good will as a separate asset. Continuing to testify, Mr. Shindler said income from continuing operations last year totaled $195 million-while net income showed $2.3 billion reflecting a sale of the international operation. He went on to say that RJR has made cash payments to the M.S.A. and FSA of $768 million in 1998, $1.6 billion in 1999, and estimates that for year 2000 the payment will be $1.2 billion. RJR also faces a substantial number of lawsuit with a potential large financial risk factor.

Concerning RJR stock, Mr. Shindler said the company bought back 6,370,656 shares of stock at a cost of 125 million when the stock was at $15-$16 a share. The stock was priced at about $31 a share the previous June. Since RJR didn't have to pay the $3.10 dividend they were able to save that cost and the stock to them was then worth $15-$16 a share.

Regarding the M.S.A. and other settlements, Mr. Shindler said RJR Is obligated to pay for the first 25 years, about $63.5B depending upon the number of cigarettes they sell and the size of the industry. Under the FSA, the company is obligated to pay $ 4.2B. Under cross examination by the plaintiff, Mr. Shindler admitted writing a letter to stockholders in which he painted a rosy picture of the company's future. In the letter he discussed how in 1999 RJR sold the international business for $8 billion and substantially reduced the company debt to about $2 billion, so that at the end of 1999, RJR had a debt of $2 billion with cash and equity of $1.2 billion and $7.1 billion respectively. The letter also said the leverage ratio is low and the cash flow was strong, and the strong balance sheet and cash flow allowed RJR to pay out nearly half of cash net income as dividends and simultaneously allowed RJR to repurchase stock shares.

BENNET LEBOW (Liggett)

Mr. Lebow testified that he sold three brands to Philip Morris because he had to or go out of business. The $300 million he received was used to pay off debts. According to Mr. Lebow, Liggett would not have paid $300 million for the brands but Philip Morris would because they owned the international brands and had the structure to exploit the brands He said it was not appropriate to value Liggett based on the Philip Morris sale because Liggett deals mostly in discount brands not premium. Right now Liggett does not have a willing buyer because of the potential of all the litigation it faces.

Regarding the MSA, Mr. Lebow said Liggett is not paying because they don't have enough volume-however by that time Liggett had already agreed with 41 other states to pay 30% of its earnings. He said since Liggett sells discount brands it does not compete with the major premium brands. Liggett is in competition with 20 other discount brands who are not part of the settlements and do not have to pay such an obligation. Liggett has no obligation to the M.S.A. unless its market share exceeds a base share of 125% of its 1997 market share or approximately 1.65% of the total cigarettes sold in the U.S.

Liggett is building a new plant which will produce 5.5 billion cigarettes a year which is financed by currant sales.

With reference to financial worth. Mr. Lebow said GAAP accounting and fair market value will give you higher or lower numbers-a company can have a net capital deficiency of $488 million, but be valued at $100 million.

On cross examination by one other defendant, Mr. Lebow testified that at the time of the M.S.A. Liggett raise prices part way even though they were not obligated to do so under the M.S.A. § criteria, and consequently Liggett made money unless its market share goes up above 1.67M. Mr. Lebow said Liggett is now doing well because of the fact that

he could raise prices to go along with the other defendants and doesn't have to make M.S.A. payment at Liggetts currant level Liggetts stock today sells at $17, up from $5 in 1996. Liggett has 20 Million shares of stock. Mr. Lebow testified that when valuing a company, look at the multiple of earnings and cash flow, a reasonable multiple of earning for a profitable company without significant liabilities is 5 to 5.5 earnings. A large foreseeable debt and a declining market can affect multiple earnings. Mr. Lebow conceded that Philip Morris has multiple earnings of less than zero according to the stock market-but he also said that he didn't think the M.S.A. obligation for Philip Morris had any significance to the stock market. Mr. Lebow said that Philip Morris raised prices, and the money to pay the M.S.A. is coming from the smokers and not out to Philip Morris's pocket. He also said that because of addiction, there not much of a limit on raising prices-maybe as much as $4 to $5. According to Mr. Lebow, Philip Morris can easily raise prices to pay a punitive damage award — Liggett cannot.

MARTIN ORLOWSKY (Lorillard)

According to Mr. Orlowsky Lorillard has 10% of the market, down .75% from the previous year. In fact in the last 15 yrs Lorillard's market share was between 7 and 10%, however sales are decreasing and Lorillard sales are down 6% from 1999. One reason is that competition is selling cheaper and Lorillard cannot lower prices because of the M.S.A. obligation. In overall ranking with the other defendants, Mr. Orlowsky says Lorillard is #4 out of 5 with 9 to 10% of the Florida market and Florida is 5% of Lorillards sales.

Mr. Orlowsky says financial reports are important because it tells the financial position of the company at a given point in time. It reflects assets minus liabilities to determine net worth. For the year 1999, Lorillards balance sheet showed

assets at $2.208.7 billion and liabilities of $1.287.5 billion, resulting in a net worth of $921,205 million.

Mr. Orlowsky further said that the company does not have the net worth money to pay out a debt, and to pay out the entire net worth, Lorillard would have to sell off all assets, pay all debts, and in essence, sell the business. Lorillard cannot borrow additional money — Mr. Orlowsky said he contacted a bank for a loan but was rejected. If any new obligations were imposed on the company, such as a large punitive damage award, Mr. Orlowsky said Lorillard would go out of business. He also said that the most accurate way to determine what a company can pay today is its net worth — not based on future income.

Mr. Orlowsky opined that what Philip Morris paid for three Liggett brands has nothing to do with the value of Lorillard and should not be used in valuing Lorillard. He said that in 1995 Lorillard offered Brown and Williamson $35.9 million for a little over 1% of the market share for 3 or 4 B & W brands, and based on about $36 million for 1% market share Lorillard would be worth $360 million using Mr. Cherners method. However that is only 1/3 of the net worth reflected on Lorillard's currant balance sheet.

With reference to the MSA, Mr. Orlowsky said Lorillards obligation for the first 25 years is $25-$30 billion. Annual payments are between $1.3 and $1.5 billion, and Lorillard has paid $1.7 billion to date.

On another note, Mr. Orlowsky said Lorillard's total advertising budget in 1998 was $43 million, but in 1999 it dropped to $18 due to the MSA. This however resulted in a savings of $25 million because of the billboard restrictions of the agreement and that money is now being used for magazine advertising. He also said that in 1999 Lorillard spent $7.7 million to advertise cigarettes and $8.4 million for youth prevention. He did say in a deposition however, that the company spent $12 Million for youth prevention and $250

million for advertising and promotion in 1999. Lumping advertising and promotion reveals that youth prevention is only 5%-6% of Lorillard's budget. According to Mr. Orlowsky, at the time of the settlements, if business stayed constant, Lorillard could afford the payments without going out of business. Lorillard knew they would have to raise prices to make the payments-in effect they mortgaged the business. The difference between the Government proposed settlement and the M.S.A. was that under the Government proposal, punitive damages would be capped which would have allowed the companies to stay in business with some degree of stability because it eliminated lawsuit liability even if it cost $100 billion dollars more than the MSA.

Mr. Orlowsky said that in 1999 Lorillard took in less than $4 Billion in sales revenue which included $600 million in Federal excise taxes-therefore revenue was not all profit. However if punitive damages exceed net worth, Lorillard will go out of business.

On examination, Mr. Orlowsky admitted that Lorillard has not yet had to pay any judgement in a lawsuit involving smoking and health. He also admitted that net income rose about 85% from 1998 to 1999 ($352 million to $652 Million) and revenue increased 41%.

In 1997 Lorillard paid dividends to Lowes (parent), of $100 million, in 1998 $450 million and in 1999 $300 million. In 1999 Lorillard retained what was left in 1999 after paying Lowes $300 as part of assets and used the money to buy $759 million of marketable securities.

According to Mr. Orlowsky, Lorillards net worth is $921 million.

SUMMARY

This then was a summary of the financial testimony of the C.E.O.'s of the various defendants. They also spent hours, and in some cases days, discussing how their individ-

ual company has changed attitudes and procedure and how each company has implemented anti-youth smoking programs costing millions of dollars. It should be noted, if not stated already, that despite the huge obligations the individual defendants have under the M.S.A. and the FSA, those payments, amounting to 22 billion dollars or more, have been made by the defendants after raising the price of cigarettes sufficiently to generate such sums, and without having to make any outlay of monies from their own pockets. The consumer or smoking public has so far, because of the price increase, been the source of funds for those huge payments.

That means that despite the shift in market share or profit margins as a result of the price increase, the tobacco companies were in no worse financial shape than they were before the M.S.A. or FSA for all intent and purposes.

One thing the C.E.O's did say was that they no longer challenge the Surgeon General's, Public Health or Scientific Communities position on generic causation and the ill effects of tobacco, and have now embarked, via the Internet, on a concentrated effort to educate the public about the good qualities of the industry and their individual company, and the dangers of youth smoking.

ISSUES

The question to be answered therefor, is whether the amount of the punitive damage award, considered in the light of the evidence of (1) the behavior of the defendants, and (2) the ability of the defendants to pay, is unreasonable.

As to the first issue — *behavior of the defendants* — this Court has no problem accepting the rational of the jury who heard all the evidence, that the award is warranted because of the behavior of the defendants. In other words, the Conscience of the Court is **NOT SHOCKED** either by the fact that an award was made, nor by the amount of the award ren-

dered by the jury considering the scope of the behavior of the defendants, and the number of people affected thereby.

The second issue — *ability to pay* —, gives the Court far more difficulty in making a determination.

The testimony at trial on this issue ranged from the low end, the suggested punitive damage award figures by the various defendants, to the high end, the estimated total worth of the defendant companies which at least one plaintiffs expert said, could exceed 200 Billion dollars. Although the individual C.E.O's testified that if an award, in the amount of, or exceeding the defendants estimated individual "net worth," was rendered by the jury, it would put them out of business, these comments were mere "naked statements" without any proof or evidence submitted that such a condition would result. It seems to this Court that not only does the defendant have the burden of proving it's net worth, it also has the burden to show, with proof, that it will go out of business if a punitive damage award reaches a certain level. It is not the burden of the plaintiffs to establish that the defendants have the financial ability to pay a specific punitive damage award. Denis Rety v. Arthur Green and Southern Commodity Corp., 546 So. 2nd 410 (Fla. 3rd DCA 1989). A mere statement to the effect that in a C.E.O.'s opinion, a company will go out of business or be bankrupt, is not sufficient without more. Remember, the defendants, although they had listed several financial expert witnesses in their pretrial documents, declined to call any of them, nor did they see fit to call any company financial officer or consultant. This record, therefore, is devoid of such proof. Conversely, the Plaintiffs experts did not present any proof that if a punitive damage award was the same or close to the experts estimated total worth figures, the Defendants would not got out of business. However, as explained in the "Rety" case, this is not the Plaintiffs burden.

The Court is then left with a seemingly impossible task, trying to determine at what level a punitive damage award

will put any of the defendants out of business. There are no figures which have been submitted as proof, that will aid the Court — only conjecture and supposition. It is easy for a C.E.O. to say that a company will go out of business if it has to pay a certain amount of money-but will it **really** go out of business.? Some of the testimony in this case was to the effect that in the world of high finance, there are many ways to leverage large loans or financial support to bail out a company in trouble and keep that company from going under. Plaintiffs experts explored that avenue, and even though some of the defendant C.E.O.'s testified that they tried to obtain loans from one or more banks or financial institutions and were unsuccessful, there was no **proof** of that submitted. The language of Inter Union of Operating Engineers v. Lassiter, 295 So.2nd 634 (Fla 4th DCA 1974) rev'd on Other grounds 314 So 2nd 761 (Fla 1975) is some what helpful in this regard.

> ". . . the term (financial resources) gives the trial judge a more *liberal standard* to determine whether a given proffer of evidence is relevant and material. For instance, there could well be, and properly so, proof as to income, cash flow, expenses, anticipated income, anticipated diminution of income, anticipated casualties...these items, among others of like moment, would be receivable **in addition** to net worth figures under the scope of *financial resources*. All of this material, including the reflection of net worth, goes to make up a defendants financial resources which the jury is entitled to consider in assessing punitive damages as commanded in Florida Standard Jury Instruction 6.12" " (emphasis added.)

What really needs to be determined then is what is the meaning of "net worth". Most commonly "net worth" is referred to as the difference between assets and liabilities, however this can be misleading because, as the evidence in

this trial pointed out, a "net worth" statement or report is only a snapshot of a moment in time and not an indicator of true worth or value. If what the courts are really interested in is whether a particular defendant has the capability of paying a large punitive damage award, then it is more than reasonable to look to that defendants **actual** worth or value, and not a "snapshot in time". The financial experts in this case testified that in valuing a company one must take into consideration many things other than "net worth". The financial resources of a company then is the best indicator of the condition of a company in determining its true value or worth. There was ample testimony in this case of the "financial resources" available to these companies to enable the experts to reach opinions as to each defendants actual worth,: ergo; a defendants ability to pay beyond a bare recitation of currant net worth!.

The experts testified, for example, that although Philip Morris declared a net worth of only $6.4 Billion dollars, the companies true value or worth was in the neighborhood of $75 Billion dollars when the company's "financial resources" were taken into consideration. There is obviously a huge gap between the two figures which then confuses the issue of when a company such as Philip Morris will have to go into bankruptcy in order to pay a punitive damage award.

It should be noted here that this Court is mindful of the line of cases that involve the issue of whether punitive damages that will result in bankruptcy or putting a defendant out of business, should be allowed, Arab Termite $ Pest Control v. Jenkins 409 So. 2nd 1039 (Fla_ 1982), Brooks v. Rios 707 So 2nd 374 (Fla 3rd DCA 1998) and Hockensmith v. Waxler, 524 So 2nd 714 (Fla 2nd DCA 1988),to name a few, However, none of these cases involve the kind of situation we find ourselves facing in this class action lawsuit. In those cases there was either unrebutted evidence of net worth, or the lack of evidence of net worth. What we have in the instant case, is a conflict in the evidence of net worth and actual worth. That

is to say, a conflict in what a company claims its net worth is, and what an opposing expert says the company's net worth **really** is. Without a clear delineation or resolution of that conflict, it is hardly possible to determine the fine line of bankruptcy or "going out of business" without indulging in the purest of speculation.

The jury heard all of this evidence-they were exposed to the same testimonial conflicts about whether a company will go "bankrupt" or "go out of business" as the Court heard. In fact the jury was informed of their duty, in deciding this case, that they must award an amount of money without financially destroying or bankrupting the defendant. (see Jury Instructions Phase IIB page 10). Was the jury in any less or better a position to make that determination than the Court, given the testimony and evidence presented?. The law, as we know, dictates that the Court shall not allow a verdict that will financially destroy or bankrupt a defendant. In this case who is to say what will or will not bankrupt a defendant or put them out of business? — the evidence certainly is not dispositive of that issue-therefore that decision will have to be made on speculation and conjecture in this particular case since there is no definable threshold available.

If one takes the defendants position that the threshold on this issue is the "currant net worth", then by implication, the Court must reject the testimony of the experts, accept at face value the position of the defendants, and disregard all testimony to the contrary. If that be the case, then there was no need for the Plaintiffs expert witnesses to testify that they disagree with the defendants figures. Under that scenario, the Court would disregard the Plaintiffs experts testimony that the true"currant net worth" must include financial resources, and accept the defendants position at face value . This would be not only unfair, but also erroneous. This is one step this Court declines to take. There was, in this Courts opinion, insufficient evidence presented at trial, to determine that one or more of the defendants will go out of

business or into bankruptcy just because they say they will. That's almost akin to asking a defendant who has just been convicted of a crime , how much of a sentence he feels he would like to serve without it having an adverse effect on him.

The Jury heard all of the testimony and saw all the evidence from both sides, and more important, the Jury heard the arguments of council at the close of the case before they rendered their verdict. If the jury heard what the Court heard, and there is insufficient evidence to establish that one or more defendant will go out of business or go into bankruptcy, and if the Jury would have to speculate on that threshold issue, just as the Court would have to speculate, then in the absence of sufficient proof, how can, or even why should the Court overrule the Jury verdict and grant a remittitur?

There is also the issue of what punitive damages is all about. Succinctly, punitive damages should punish a defendant and act as a deterrent to future behavior. Punishment in this context means to cause some "hurt' to the defendant (in this case monetary hurt), that will send him or it a message. If a monetary sanction was imposed that caused no "hurt" then the purpose of the punitive award is negated. Continuing with this thought, and harking back to what has been said about the way the defendants have financed their obligations under the M.S.A. and the FSA, if a punitive damage award was imposed upon the defendants that they could satisfy by simply raising the price of their products, then what has been accomplished in this case

This Court is not of the opinion that just because we are talking about vast sums of money, that there automatically has to be a remittitur. This Court after very careful consideration, in good conscience really could not set a figure ,or a level, at which a remittitur could be set without indulging in the sheerest of speculation. To do so would be nothing more than engaging in an arbitrary exercise, given the state of the

evidence or lack thereof.. To remit to the level that the defendants have espoused (their net worth statement) would be wrong as explained above. The Court feels it best to consider the level found by the jury who, as the court has said many times herein, heard the same testimony and evidence as the Court.

It should be noted here that this Court has carefully considered the criteria dictated in F.S.A. Sec 768.74(5) and has determined that:

1. This jury after sitting for two solid years in trial, did not evince any prejudice, passion or corruption in rendering its verdict. The jury had to render three separate verdicts in this cause-each one was derived after an enormous amount of evidence was presented, and in this Courts opinion, each verdict comported with the evidence adduced at trial.

2. Again, after sitting for two solid years in trial, it is inconceivable that this jury ignored or misconceived the evidence or the merits of the case. The Court observed the jury taking careful notes during the trial — in fact filling several notepads in most cases, and being attentive throughout.

3. In reaching its verdict in this case, the jury was exposed to a great deal of testimony regarding the activities, and the financial condition of the various defendants. The evidence of financial condition was discussed by two Plaintiffs experts, and at least five C.E.O.'s of the defendant companies. It was highly complex, but did cover a range of amounts and economic theories from which the jury could make a decision.

4. This was a class action case, in which the issue of punitive damages was determined in the aggregate for the entire class which, the evidence indicated, could be as high as several hundred thousand people. Although the compensatory damage claim was tried for only three class representatives, the awards amounted to approximately 12.7 million dollars. Extrapolating that figure to the overall size of the class re-

sults in an extraordinarily high figure, therefore, one can say there is a reasonable relationship to damages proved and the injuries suffered, but more important, the award is in keeping with the degree of the wrongful conduct without sending the defendant into bankruptcy.

5. In the Courts opinion, the amount of the jury verdict is within the parameters of the evidence at trial-within the limits of the highs and the lows, albeit on the high side, but when the enormity of the facts and issues of this case are considered, the award cannot be said to be unreasonable.

Therefore; Defendant's Motion for Remittitur or New Trial, is DENIED.

WHEREFORE, IT IS ORDERED AND ADJUDGED as follows:

1. Class Representative Mary Farnan shall recover from Defendants Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company, Lorillard Tobacco Company/Lorillard, Inc., Liggett Group, Inc. and Brooke Group Holding, Inc., jointly and severally, the sum of $2,850,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

2. Class Representative Frank Amodeo shall recover from Defendants Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company, Lorillard Tobacco Company/Lorillard, Inc., Liggett Group, Inc. and Brooke Group Holding, Inc., jointly and severally, the sum of $5,831,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

3. Class Representative Ralph Della Vecchia, as surviving spouse of Angie Della Vecchia, deceased, shall recover

from Defendants Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company, Lorillard Tobacco Company/Lorillard, Inc., Liggett Group, Inc. and Brooke Group Holding, Inc., jointly and severally, the sum of $1,500,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

4. James Della Vecchia, as surviving minor son of Angie Della Vecchia, deceased, shall recover from Defendants Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company, Lorillard Tobacco Company/Lorillard, Inc., Liggett Group, Inc. and Brooke Group Holding, Inc., jointly and severally, the sum of $2,000,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

5. The Estate of Angie Della Vecchia shall recover from Defendants Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company, Lorillard Tobacco Company/Lorillard, Inc., Liggett Group, Inc. and Brooke Group Holding, Inc., jointly and severally, the sum of $523,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

6. The Florida Class shall recover from Defendant Philip Morris, Incorporated the sum of $73,960,000,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

7. The Florida Class shall recover from Defendant R.J. Reynolds Tobacco Company the sum of $36,280,000,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

8. The Florida Class shall recover from Defendant Brown & Williamson Tobacco Corporation, individually and

as successor by merger to the American Tobacco Company, the sum of $17,590,000,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

9. The Florida Class shall recover from Defendant Lorillard Tobacco Company/Lorillard, Inc., the sum of $16,250,000,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

10. The Florida Class shall recover from Defendant Liggett Group, Inc./Brooke Group Holding, Inc., the sum of $790,000,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

11. The Florida Class shall recover from Defendant Council for Tobacco Research, the sum of $1,195,210 that shall bear interest at the rate of 10% a year, for which let execution issue.

12. The Florida Class shall recover from Defendant Tobacco Institute, the sum of $278,339 that shall bear interest at the rate of 10% a year, for which let execution issue.

True copies of the written Verdicts in Phases I, II and II-B are attached hereto.

All sums payable to the Florida Class shall be paid to the Registry of the Dade County Circuit Court and will be maintained for the benefit of the Florida Class.

This Court reserves jurisdiction to award attorneys fees to Class Counsel, Stanley and Susan Rosenblatt and to award costs.

This Court further reserves jurisdiction to enforce the terms of this Final Judgment Nunc Pro Tunc, to supervise the maintenance and disposition of the punitive damage fund to class members and to enter any further Orders and conduct further proceedings pursuant to the Mandate of the Third District Court of Appeal of Florida.

DONE AND ORDERED at Miami, Dade County, Florida this _7_ day of ***NOVEMBER*** in the year **2000**.

/s/ Robert P. Kaye
Judge Robert P. Kaye
Circuit Judge

cc: All Counsel of Record

APPENDIX D

[Order of the Supreme Court of Florida on Rehearing, (December 21, 2006)]

Supreme Court of Florida

THURSDAY, DECEMBER 21, 2006

CASE NOS.: SC03-1856

Lower Tribunal Nos.: 3D00-3400
3D00-3206
3D00-3207
3D00-3208
3D00-3210
3D00-3212
3D00-3215

HOWARD A. ENGLE, M.D., ET AL.	vs. LIGGETT GROUP INC., ET AL.
Petitioner(s)	Respondent(s)

The motions for rehearing filed by the petitioners and Liggett Group, LLC., are hereby denied. Respondents' motion for rehearing is hereby granted in part and denied in part, and the opinion issued July 6, 2006, is hereby withdrawn. The opinion dated December 21, 2006, is issued in lieu thereof and has been revised as follows: The Court upholds the Phase I finding in favor of the Engle Class on Question 7 (breach of express warranty). However, the Court's determination that the fraud and misrepresentation finding in Question 4 cannot stand, necessarily invalidates the conspiracy to misrepresent finding in Question 5. The Court also corrects a misstatement regarding one of the jury's findings as to class representative Della Vecchia. The opinion has been revised on pages 4, 6, and 5253, and these revisions are set forth in bold and strike-through below:

This same majority concludes that it was proper to allow the jury to make findings in Phase I on Questions 1 (general causation), 2 (addiction of cigarettes), 3 (strict liability), 4(a) (fraud by concealment), ~~5 (civil conspiracy misrepre-~~

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~~sentation),~~ 5(a) (civil-conspiracy-concealment), 6 (breach of implied warranty), 7 **(breach of express warranty)**, and 8 (negligence). Therefore, these findings in favor of the Engle Class can stand. The Court unanimously agrees that the nonspecific findings in favor of the plaintiffs on Questions 4 (fraud and misrepresentation) and 9 (intentional infliction of emotional distress) are inadequate to allow a subsequent jury to consider individual questions of reliance and legal cause. Therefore, these findings cannot stand. **Because the finding in favor of the plaintiffs on Question 5 (civil conspiracy-misrepresentation) relies on the underlying tort of misrepresentation, this finding also cannot stand.**

....

... The jury specifically found that her ~~conditions were~~ **lung disease was** caused by smoking....

....

We approve the Phase I findings for the class as to Questions 1 (that smoking cigarettes causes aortic aneurysm, bladder cancer, cerebrovascular disease, cervical cancer, chronic obstructive pulmonary disease, coronary heart disease, esophageal cancer, kidney cancer, laryngeal cancer, lung cancer (specifically, adenocarinoma, large cell carcinoma, small cell carcinoma, and squamous cell carcinoma), complications of pregnancy, oral cavity/tongue cancer, pancreatic cancer, peripheral vascular disease, pharyngeal cancer, and stomach cancer), 2 (that nicotine in cigarettes is addictive), 3 (that the defendants placed cigarettes on the market that were defective and unreasonably dangerous), 4(a) (that the defendants concealed or omitted material information not otherwise known or available knowing that the material was false or misleading or failed to disclose a material fact concerning the health effects or addictive nature of smoking cigarettes or both), ~~5 (that all of the defendants agreed to misrepresent information relating to the health effects of cigarettes or the addictive nature of cigarettes with~~

~~the intention that smokers and the public would rely on this information to their detriment)~~, 5(a) (that the defendants agreed to conceal or omit information regarding thehealth effects of cigarettes or their addictive nature with the intention that smokers and the public would rely on this information to their detriment), 6 (that all of the defendants sold or supplied cigarettes that were defective), (7) (**that all of the defendants sold or supplied cigarettes that, at the time of sale or supply, did not conform to representations of fact made by said defendants**), and 8 (that all of the defendants were negligent). Therefore, these findings in favor of the Engle Class can stand.

NO FURTHER MOTIONS FOR REHEARING WILL BE ENTERTAINED BY THIS COURT.

LEWIS, C.J., and ANSTEAD, PARIENTE, and QUINCE, JJ., concur.

WELLS and BELL, JJ., would grant the motion of Liggett Group LLC and would grant the motion of the other respondents on all points.

CANTERO, J., recused.

APPENDIX E

[Certain Defendants' Proposed Jury Instruction on Preemption in the Circuit Court for Dade County, Florida (June 14, 1999)]

DEFENDANTS' PROPOSED INSTRUCTION ON PREEMPTION

Throughout the trial, you have occasionally heard the Court or the lawyers mention the word "preemption." "Preemption" is a doctrine of federal law that limits the claims that plaintiffs can make in this case. You need to understand this limitation in order to perform your duties as jurors.

The doctrine of preemption arises from the federal law enacted by the United States Congress on July 1, 1969, in which Congress mandated that every pack of cigarettes bear a specific warning label written by Congress itself. Later, Congress required that those same warning labels appear on each cigarette brand advertisement.

Congress determined that the federally mandated warnings were sufficient to warn consumers about the risks of smoking. Congress therefore prohibited any person, from July, 1969, forward, from claiming or suggesting that consumers should be provided any additional information or warning beyond the warnings on the packs of cigarettes. Congress also provided that, as long as the packs of cigarettes bear the federally mandated warning, cigarette advertising from July 1, 1969, forward cannot be the subject of any claim that the advertising undermined or neutralized the warnings or made them less effective.

In this case, plaintiffs have from time to time claimed or suggested that smokers were not aware of certain information or should have been provided certain information. To the extent that any such claim or suggestion related to periods after July 1, 1969, I hereby instruct you that any such claim is preempted and that you should ignore and not consider any evi-

dence, answer or question claiming or suggesting that additional information should have been provided after July 1, 1969.

I instruct you that plaintiffs are not permitted to claim and you are not permitted to find that, after July 1, 1969, defendants should have provided additional information to consumers concerning the health effects of smoking. By "health effects," I mean to include addictions as well as the illnesses that plaintiffs claim are caused by smoking. Accordingly, plaintiffs cannot base any claim on, and you may not find defendants at fault for, not providing additional information or warning to the public after July 1, 1969, about the relationship between smoking and health.

I further instruct you that you cannot consider and must ignore any claim or suggestion by plaintiffs that defendants, at any time after July 1, 1969, concealed or hid from class members scientific or other knowledge or information relating to smoking and health, including information concerning the health effects of cigarette smoking, concerning cigarette ingredients or smoke constituents, or concerning the alleged addictiveness of nicotine.

From time to time in this case, plaintiffs have claimed or suggested that cigarette advertising undermined awareness of the risks of smoking, or was too attractive or too effective or glamorized smoking or other such similar claims. The plaintiffs have also claimed that defendants' advertisements and promotions were intended to encourage young people, members of ethnic minority groups, or other s to start smoking. Defendants have offered testimony and evidence that they do not market to youths or non-smokers. I here instruct you to ignore any such claims or suggestions or evidence regarding any of these activities after July 1, 1969.

APPENDIX F

[Phase I Verdict Form (July 7, 1999)]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 94-08273 CA-22

HOWARD A. ENGLE, M.D., et al.,
Plaintiffs,
v.
RJ REYNOLDS TOBACCO COMPANY,
et al.,
Defendants
_____/

VERDICT FORM FOR PHASE I

We, the Jury, return the following Verdict:

Question No. 1

[Generic Causation]

Does smoking cigarettes cause one or more of the following diseases or medical conditions?

Aortic Aneurysm	Yes X	No ___
Asthmatic Bronchitis, as related to COPD	Yes ___	No X
Bladder Cancer	Yes X	No ___

Cerebrovascular Disease (including Stroke)	Yes X	No ___
Cervical Cancer	Yes X	No ___
Chronic Obstructive Pulmonary Disease-COPD (including Emphysema)	Yes X	No ___
Coronary Heart Disease (including cardiovascular disease, hardening of the arteries, atherosclerosis, coronary artery disease and arteriosclerosis, angina, abnormal blood clogging, blood vessel damage, myocardial infarction (heart attack))	Yes X	No ___
Esophageal (Throat) Cancer	Yes X	No ___
Infertility	Yes ___	No X
Kidney Cancer	Yes X	No ___
Laryngeal (Throat or Voice Box) Cancer	Yes X	No ___
Lung Cancer	Yes X	No ___
Adenocarcinoma	Yes X	No ___
Bronchioloalveolar carcinoma	Yes ___	No X
Large cell carcinoma	Yes X	No ___
Small cell carcinoma	Yes X	No ____
Squamous cell carcinoma	Yes X	No ____
Complications of Pregnancy (miscarriage)	Yes X	No ___
Oral Cavity/Tongue Cancer	Yes X	No ___
Pancreatic Cancer	Yes X	No ___
Peripheral Vascular Disease (including Buerger's Disease)	Yes X	No ___

Pharyngeal Cancer	Yes X	No ___
Stomach Cancer	Yes X	No ___

If your answer to all of the diseases, above, is "no", your verdict is for the Defendants, and you should not proceed further except to date and sign this verdict form. If you answered "yes" to any of the above questions, please answer the following questions:

Question No. 2

[Addiction Dependence]

Are cigarettes that contain nicotine addictive or dependence producing?

Yes X No __

Question No. 3

[Strict Liability]

Did one or more of the Defendant Tobacco Companies place cigarettes on the market that were defective and unreasonably dangerous?

Please answer "Yes" or "No" as to each Defendant, below. If you answer "yes" to any Defendants, please answer whether the conduct occurred during one of the following time periods:

Philip Morris, Incorporated	Yes X	No ___
Before July 1, 1974	Yes __	No ___
After July 1, 1974	Yes __	No ___
Both before and after July 1, 1974	Yes X	No ___
RJ Reynolds Tobacco Company	Yes X	No ___
Before July 1, 1974	Yes __	No ___
After July 1, 1974	Yes __	No ___
Both before and after July 1, 1974	Yes X	No ___

Brown & Williamson Tobacco Corporation	Yes X	No ___
Before July 1, 1974	Yes ___	No ___
After July 1, 1974	Yes ___	No ___
Both before and after July 1, 1974	Yes X	No ___
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes X	No ___
Before July 1, 1974	Yes ___	No ___
After July 1, 1974	Yes ___	No ___
Both before and after July 1, 1974	Yes X	No ___
Lorillard Tobacco Company/Lorillard, Inc.	Yes X	No ___
Before July 1, 1974	Yes ___	No ___
After July 1, 1974	Yes ___	No ___
Both before and after July 1, 1974	Yes X	No ___
Liggett Group, Inc.	Yes X	No ___
Before July 1, 1974	Yes ___	No ___
After July 1, 1974	Yes ___	No ___
Both before and after July 1, 1974	Yes X	No ___
Brooke Group, Ltd., Inc.	Yes X	No ___
Before July 1, 1974	Yes ___	No ___
After July 1, 1974	Yes X	No ___
Both before and after July 1, 1974	Yes ___	No ___

Question No. 4

[Fraud and Misrepresentation]

Did one or more of the Defendants make a false statement of a material fact, either knowing the statement was

false or misleading, or being without knowledge as to its truth or falsity, with the intention of misleading smokers?

Please answer "Yes" or "No" as to each Defendant, below. If you answer "yes" to any Defendants, please answer whether the conduct occurred during one of the following time periods:

Philip Morris, Incorporated	Yes X No __
Before May 5, 1982	Yes __ No __
After May 5, 1982	Yes __ No __
Both before and after May 5, 1982	Yes X No __
RJ Reynolds Tobacco Company	Yes X No __
Before May 5, 1982	Yes __ No __
After May 5, 1982	Yes __ No __
Both before and after May 5, 1982	Yes X No __
Brown & Williamson Tobacco Corporation	Yes X No __
Before May 5, 1982	Yes __ No __
After May 5, 1982	Yes __ No __
Both before and after May 5, 1982	Yes X No __
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes X No __
Before May 5, 1982	Yes __ No __
After May 5, 1982	Yes __ No __
Both before and after May 5, 1982	Yes X No __
Lorillard Tobacco Company/Lorillard, Inc.	Yes X No __
Before May 5, 1982	Yes __ No __
After May 5, 1982	Yes __ No __
Both before and after May 5, 1982	Yes X No __

Liggett Group, Inc.	Yes X	No __
Before May 5, 1982	Yes __	No __
After May 5, 1982	Yes __	No __
Both before and after May 5, 1982	Yes X	No __
Brooke Group, Ltd., Inc.	Yes X	No __
Before May 5, 1982	Yes __	No __
After May 5, 1982	Yes X	No __
Both before and after May 5, 1982	Yes __	No __
Council for Tobacco Research-U.S.A.	Yes X	No __
Before May 5, 1982	Yes __	No __
After May 5, 1982	Yes __	No __
Both before and after May 5, 1982	Yes X	No __
Tobacco Institute	Yes X	No __
Before May 5, 1982	Yes __	No __
After May 5, 1982	Yes __	No __
Both before and after May 5, 1982	Yes X	No __

Question No. 4a

[Fraud by Concealment]

Did one or more of the Defendants conceal or omit material information, not otherwise known or available, knowing the material was false or misleading, or failed to disclose a material fact concerning or proving the health effects and/or addictive nature of smoking cigarettes?

Please answer "Yes" or "No" as to each Defendant, below. If you answer "yes" to any Defendants, please answer whether the conduct occurred during one of the following time periods:

Philip Morris, Incorporated	Yes X	No __

Before May 5, 1982	Yes ___	No ___
After May 5, 1982	Yes ___	No ___
Both before and after May 5, 1982	Yes X	No ___
RJ Reynolds Tobacco Company	Yes X	No ___
Before May 5, 1982	Yes ___	No ___
After May 5, 1982	Yes ___	No ___
Both before and after May 5, 1982	Yes X	No ___
Brown & Williamson Tobacco Corporation	Yes X	No ___
Before May 5, 1982	Yes ___	No ___
After May 5, 1982	Yes ___	No ___
Both before and after May 5, 1982	Yes X	No ___
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes X	No ___
Before May 5, 1982	Yes ___	No ___
After May 5, 1982	Yes ___	No ___
Both before and after May 5, 1982	Yes X	No ___
Lorillard Tobacco Company/Lorillard, Inc.	Yes X	No ___
Before May 5, 1982	Yes ___	No ___
After May 5, 1982	Yes ___	No ___
Both before and after May 5, 1982	Yes X	No ___
Liggett Group, Inc.	Yes X	No ___
Before May 5, 1982	Yes ___	No ___
After May 5, 1982	Yes ___	No ___
Both before and after May 5, 1982	Yes X	No ___
Brooke Group, Ltd., Inc.	Yes X	No ___
Before May 5, 1982	Yes ___	No X

After May 5, 1982	Yes X	No __
Both before and after May 5, 1982	Yes __	No __
Council for Tobacco Research-U.S.A.	Yes X	No __
Before May 5, 1982	Yes __	No __
After May 5, 1982	Yes __	No __
Both before and after May 5, 1982	Yes X	No __
Tobacco Institute	Yes X	No __
Before May 5, 1982	Yes __	No __
After May 5, 1982	Yes __	No __
Both before and after May 5, 1982	Yes X	No __

Question No. 5

[Civil Conspiracy-Misrepresentation]

Did two or more of the Defendants enter into an agreement to misrepresent information relating to the health effects of cigarette smoking, or the addictive nature of smoking cigarettes, with the intention that smokers and members of the public rely to their detriment.?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	Yes X	No __
RJ Reynolds Tobacco Company	Yes X	No __
Brown & Williamson Tobacco Corporation	Yes X	No __
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes X	No __
Lorillard Tobacco Company/Lorillard, Inc.	Yes X	No __
Liggett Group, Inc.	Yes X	No __
Brooke Group, Ltd., Inc.	Yes X	No __

Council for Tobacco Research-U.S.A.	Yes X No __
Tobacco Institute	Yes X No __

Question No. 5a

[Civil Conspiracy-Concealment]

Did two or more of the Defendants enter into an agreement to conceal or omit information regarding the health effects of cigarette smoking, or the addictive nature of smoking cigarettes, with the intention that smokers and members of the public rely to their detriment.?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	Yes X No __
RJ Reynolds Tobacco Company	Yes X No __
Brown & Williamson Tobacco Corporation	Yes X No __
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes X No __
Lorillard Tobacco Company/Lorillard, Inc.	Yes X No __
Liggett Group, Inc.	Yes X No __
Brooke Group, Ltd., Inc.	Yes X No __
Council for Tobacco Research-U.S.A.	Yes X No __
Tobacco Institute	Yes X No __

Question No. 6

[Breach of Implied Warranty]

Did one or more of the Defendant Tobacco Companies sell or supply cigarettes that were defective in that they were not reasonably fit for the uses intended?

Please answer "Yes" or "No" as to each Defendant, below. If you answer "yes" to any Defendants, please answer

whether the conduct occurred during any of the following time periods:

Philip Morris, Incorporated	Yes X	No __
Before July 1, 1969	Yes X	No __
July 1, 1969 thru July 1, 1974	Yes X	No __
After July 1, 1974	Yes X	No __
RJ Reynolds Tobacco Company	Yes X	No __
Before July 1, 1969	Yes X	No __
July 1, 1969 thru July 1, 1974	Yes X	No __
After July 1, 1974	Yes X	No __
Brown & Williamson Tobacco Corporation	Yes X	No __
Before July 1, 1969	Yes X	No __
July 1, 1969 thru July 1, 1974	Yes X	No __
After July 1, 1974	Yes X	No __
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes X	No __
Before July 1, 1969	Yes X	No __
July 1, 1969 thru July 1, 1974	Yes X	No __
After July 1, 1974	Yes X	No __
Lorillard Tobacco Company/Lorillard, Inc.	Yes X	No __
Before July 1, 1969	Yes X	No __
July 1, 1969 thru July 1, 1974	Yes X	No __
After July 1, 1974	Yes X	No __
Liggett Group, Inc.	Yes X	No __
Before July 1, 1969	Yes X	No __
July 1, 1969 thru July 1, 1974	Yes X	No __
After July 1, 1974	Yes X	No __
Brooke Group, Ltd., Inc.	Yes X	No __
Before July 1, 1969	Yes __	No X
July 1, 1969 thru July 1, 1974	Yes __	No X
After July 1, 1974	Yes X	No __

Question No. 7

[Breach of Express Warranty]

Did one or more of the Defendant Tobacco Companies sell or supply cigarettes that, at the time of sale or supply, did not conform to representations of fact made by said Defendant(s), either orally or in writing?

Please answer "Yes" or "No" as to each Defendant, below. If you answer "yes" to any Defendants, please answer whether the conduct occurred during one of the following time periods:

Philip Morris, Incorporated	Yes X	No __
Before July 1, 1974	Yes ___	No __
After July 1, 1974	Yes ___	No __
Both before and after July 1, 1974	Yes X	No __
RJ Reynolds Tobacco Company	Yes X	No __
Before July 1, 1974	Yes ___	No __
After July 1, 1974	Yes ___	No __
Both before and after July 1, 1974	Yes X	No __
Brown & Williamson Tobacco Corporation	Yes X	No __
Before July 1, 1974	Yes ___	No __
After July 1, 1974	Yes ___	No __
Both before and after July 1, 1974	Yes X	No __
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes X	No __
Before July 1, 1974	Yes ___	No __
After July 1, 1974	Yes ___	No __
Both before and after July 1, 1974	Yes X	No __
Lorillard Tobacco Company/Lorillard, Inc.	Yes X	No __

Before July 1, 1974	Yes ___	No __
After July 1, 1974	Yes ___	No __
Both before and after July 1, 1974	Yes X	No __
Liggett Group, Inc.	Yes X	No __
Before July 1, 1974	Yes ___	No __
After July 1, 1974	Yes ___	No __
Both before and after July 1, 1974	Yes X	No __
Brooke Group, Ltd., Inc.	Yes X	No __
Before July 1, 1974	Yes ___	No X
After July 1, 1974	Yes X	No __
Both before and after July 1, 1974	Yes ___	No __

Question No. 8

[Negligence]

Have Plaintiffs proven that one or more of the Defendant Tobacco Companies failed to exercise the degree of care which a reasonable cigarette manufacturer would exercise under like circumstances?

Please answer "Yes" or "No" as to each Defendant, below. If you answer "yes" to any Defendants, please answer whether the conduct occurred during one of the following time periods:

Philip Morris, Incorporated	Yes X	No __
Before July 1, 1969	Yes ___	No __
After July 1, 1969	Yes ___	No __
Both before and after July 1, 1969	Yes X	No __
RJ Reynolds Tobacco Company	Yes X	No __
Before July 1, 1969	Yes ___	No __
After July 1, 1969	Yes ___	No __
Both before and after July 1, 1969	Yes X	No __

Brown & Williamson Tobacco Corporation	Yes X	No __
Before July 1, 1969	Yes ___	No __
After July 1, 1969	Yes ___	No __
Both before and after July 1, 1969	Yes X	No __
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes X	No __
Before July 1, 1969	Yes ___	No __
After July 1, 1969	Yes ___	No __
Both before and after July 1, 1969	Yes X	No __
Lorillard Tobacco Company/Lorillard, Inc.	Yes X	No __
Before July 1, 1969	Yes ___	No __
After July 1, 1969	Yes ___	No __
Both before and after July 1, 1969	Yes X	No __
Liggett Group, Inc.	Yes X	No __
Before July 1, 1969	Yes ___	No __
After July 1, 1969	Yes ___	No __
Both before and after July 1, 1969	Yes X	No __
Brooke Group, Ltd., Inc.	Yes X	No __
Before July 1, 1969	Yes ___	No __
After July 1, 1969	Yes X	No __
Both before and after July 1, 1969	Yes ___	No __

Question No. 9

[Intentional Infliction of Emotional Distress]

Have Plaintiffs proven that one or more of the Defendant Tobacco Companies engaged in extreme and outrageous conduct or with reckless disregard relating to cigarettes sold

or supplied to Florida smokers with the intent to inflict severe emotional distress?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	Yes X No __
RJ Reynolds Tobacco Company	Yes X No __
Brown & Williamson Tobacco Corporation	Yes X No __
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes X No __
Lorillard Tobacco Company/Lorillard, Inc.	Yes X No __
Liggett Group, Inc.	Yes X No __
Brooke Group, Ltd., Inc.	Yes X No __

Question No. 10

[Entitlement to Punitive Damages]

Under the circumstances of this case, state below whether the conduct of any Defendant rose to a level that would permit a potential award or entitlement to punitive damages.

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	Yes X No __
RJ Reynolds Tobacco Company	Yes X No __
Brown & Williamson Tobacco Corporation	Yes X No __
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes X No __
Lorillard Tobacco Company/Lorillard, Inc.	Yes X No __
Liggett Group, Inc.	Yes X No __
Brooke Group, Ltd., Inc.	Yes X No __
Council for Tobacco Research-	Yes X No __

U.S.A.
Tobacco Institute Yes X No __

SO SAY WE ALL, this 7th day of July, 1999

/s/ Leighton Anthony Finegan
FOREPERSON

APPENDIX G

Post-*Cipollone* Decisions Addressing Preemption of "Concealment" and "Neutralization" Claims

Federal Cases:

Brown v. *Brown & Williamson Tobacco Corp.*, 479 F.3d 383, 394 (5th Cir. 2007) ("Because a concealment claim relies, by its nature, on an unfulfilled duty to disclose additional information, it would seem unavoidably to impose a state law requirement as to marketing and advertising related to smoking and health.")

Rivera v. *Philip Morris, Inc.*, 395 F.3d 1142, 1147 (9th Cir. 2005) (holding failure-to-warn and fraudulent concealment claims not preempted to the extent that they rely on channels of communication other than "advertising or promotion")

Spain v. *Brown & Williamson Tobacco Corp.*, 363 F.3d 1183, 1200-02 (11th Cir. 2004) (holding that *Cipollone* requires preemption of claims of "fraudulent suppression" and conspiracy to fraudulently misrepresent the dangers of cigarettes, but adding that "insofar as the claim is premised on the allegation that defendants made statements knowing their falsity, or with reckless disregard as to their truth or falsity, it is not preempted by the Labeling Act")

Glassner v. *R.J. Reynolds Tobacco Co.*, 223 F.3d 343 (6th Cir. 2000) (holding that "claims of fraud based upon fraudulent misrepresentation and concealment are preempted to the extent that they are predicated on a duty to issue additional or clearer warnings through advertising and promotion")

Allgood v. *R.J. Reynolds Tobacco Co.*, 80 F.3d 168, 171 (5th Cir. 1996) ("To the extent that plaintiffs' claims are based on fraudulent concealment or a failure to warn after 1969, they are preempted by the Federal Cigarette Labeling and Advertising Act.")

Hearn v. *R.J. Reynolds Tobacco Co.*, 279 F. Supp. 2d 1096, 1112 (D. Ariz. 2003) (holding that concealment claims are preempted only if based on non-disclosure through advertis-

ing channels; "fraudulent concealment claims are not preempted to the extent that they rely on a state-law duty to disclose such facts through channels of communication other than advertising or promotion")

Waterhouse v. *R.J. Reynolds Tobacco Co.*, 270 F. Supp. 2d 678, 684 (D. Md. 2003) (finding fraudulent concealment claim preempted as "nothing more than a failure-to-warn claim in different dress")

DeLuca v. *Liggett & Myers Inc.*, No. 00 C 7781, 2003 WL 1798940, at *3 (N.D. Ill. Apr. 4, 2003) (finding fraudulent concealment claims preempted because of lack of duty to disclose independent of sales, marketing, and promotion channels)

Izzarelli v. *R. J. Reynolds Tobacco Co.*, 117 F. Supp. 2d 167, 175 (D. Conn. 2000) ("[*Cipollone*] held that claims of fraudulent misrepresentation and concealment based on a state law duty to disclose facts through channels other than advertising and promotion are not preempted.")

Wright v. *Brooke Group Ltd.*, 114 F. Supp. 2d 797, 825 (N.D. Iowa 2000) ("[T]his court finds that Wright's post-1969 claim of fraud based upon concealment is preempted to the extent that it is predicated on a duty to issue additional or clearer warnings through advertising and promotion.")

Blue Cross & Blue Shield of New Jersey v. *Philip Morris*, 113 F. Supp. 2d 345 (E.D.N.Y. 2000) (holding that claims based on theories of fraudulent concealment, nondisclosure, and omission of information were not preempted).

Falise v. American Tobacco Co., 94 F. Supp. 2d 316, 356-57 (E.D.N.Y. 2000) (reading *Cipollone* not to preempt common-law fraud claims alleging "false representation[s] of [ ] material fact[s]" and "concealment of [ ] material fact[s]").

Barnes v. *Philip Morris Inc.*, No. 98-106 (E.D. Ky. Mar. 24, 1999) ("[Plaintiff's] negligent concealment claim is preempted because [plaintiff] fails to demonstrate, and the Court cannot identify, any duty in Kentucky to disclose information

through channels of communication other than advertising or promotion.")

Romine v. *R.J. Reynolds Tobacco Co.*, No. 4:98-CV-424 (LR-C-98-424), 1999 U.S. Dist. LEXIS 6864, at *4-*5 (E.D. Ark. Mar. 19, 1999) ("Plaintiff alleges that Defendants' failure to provide enhanced warnings contributed to his continued smoking that eventually culminated in his lung cancer, throat cancer, and emphysema. The only way for Defendants to have avoided any liability under this claim would have been to disclose the ingredients of their cigarettes. This would clearly be a requirement 'based on smoking and health.'") (citations omitted)

LaBelle v. *Brown & Williamson Tobacco Corp.*, C.A. No. 2:98-3235-23, 1999 WL 33591435, at *5 (D.S.C. March 18, 1999) (holding that "plaintiff's [fraud] claim is only pre-empted to the extent that it relies on those other general allegations of concealment of information relating to smoking and health")

Stewart v. *R.J. Reynolds Tobacco Co.*, No. 4:98-CV-425 (LR-C-98-425), 1999 U.S. Dist. LEXIS 6858 (E.D. Ark. Mar. 8, 1999) (same order as *Romine*)

Boerner v. *Brown & Williamson Tobacco Co.*, 126 F. Supp. 2d 1160, 1171 (E.D. Ark. 1999) ("preemption would apply to fraudulent concealment allegations to the extent such a claim alleged neutralization of warnings or non-disclosure of information in cigarette advertising or promotion")

Little v. *Brown & Williamson Tobacco Corp.*, C.A. 2:98-1879-23, 1999 WL 33291385, at *6 (D.S.C. Mar. 3, 1999) ("However, plaintiffs' claims are pre-empted to the extent that they rest on allegations that defendant concealed or failed to disclose information relating to the health effects of smoking. The court recognizes, however, that some courts that have considered the latter issue would disagree.")

Smith v. *Brown & Williamson Tobacco Corp.*, No. 96-0459-CV-W-3, 1999 WL 33944680, at *7 (W.D. Mo. Jan. 29,

1999) (holding that fraudulent concealment claim fell "squarely within the area of preempted claims because it explicitly alleges that Defendant failed to provide sufficient information to the public")

Tucker v. *Brown & Williamson Tobacco Corp.*, No. 98-CV-0655 (W.D. La. Oct. 21, 1998) ("State law claims based upon the failure of a cigarette manufacturer to adequately warn consumers or breach of a duty to warn are generally preempted. Allegations of fraudulent concealment, intentional fraud, and misrepresentation, however, may bring a plaintiff's claim outside the preemption mandated by 15 U.S.C. 1334. As plaintiff has produced no evidence of fraudulent concealment, intentional fraud, and misrepresentation, summary judgment is proper.")

Chutz-Reymers v. *Liggett Group, Inc.*, No. 96-409-CIV-T-24(B) (M.D. Fla. May 22, 1998) (finding claims preempted "to the extent the claims assert a failure to warn through 'other means'" than advertising and promotion)

Levy v. *Brown & Williamson Tobacco Corp.*, No. 96-2280-CIV-T-24(B) (M.D. Fla. Apr. 19, 1998) ("[P]laintiffs' counsel at the hearing seemed to be attempting to present failure to warn evidence in the guise of fraudulent concealment. Consequently, failure to warn claims should be determined to be preempted with respect to all remaining counts of each second amended complaint.")

Durkin v. *Philip Morris Tobacco Corp.*, No. 3:CV-97-0887, 1998 U.S. Dist. LEXIS 21562, at *9 (M.D. Pa. February 17, 1998) ("[T]his court must look beyond the descriptive label a plaintiff attaches to a claim in determining whether or not the claim is preempted. If a plaintiff could assert a duty inconsistent with the Labeling Act merely by styling it 'fraudulent suppression,' the preemption provision of the Labeling Act would be deprived of any meaningful application.")

Sanchez v. *Liggett & Myers, Inc.*, No. C-97-301, 1999 U.S. Dist. LEXIS (S.D. Tex. Jan. 8, 1998) (holding that fraudulent concealment and other claims "are essentially claims alleging

that the Defendants misrepresented and concealed the health risks of cigarette smoking")

Perez v. *Brown & Williamson Tobacco Corp.*, 967 F. Supp. 920, 928 (S.D. Tex. 1997) (holding that Plaintiffs' claims of fraud and misrepresentation are "claims alleging that the Defendants misrepresented and concealed the health risks of cigarette smoking" and are preempted)

Lacey v. *Lorillard Tobacco Inc.*, 956 F. Supp. 956, 963 (N.D. Ala. 1997) (holding that recognizing a duty inconsistent with the Labeling Act merely by calling it "fraudulent suppression" would deprive the Act "of any meaningful application")

Davis v. *Tobacco Co. of Prods.* (Kool, Newport, Pall Mall, Marlboro Cigarettes), No. SA-96-CA-782, 1997 WL 33147703 (W.D. Tex. May 21, 1997) ("All claims of a smoker based upon 'fraudulent concealment or failure to warn after 1969' are preempted by the 'Labeling Act.'")

Whirley v. *American Brands, Inc.*, No. C-97-009, 1997 WL 881215, at *6 (S.D. Tex. Apr. 7, 1997), aff'd per curiam, 139 F.3d 898 (5th Cir. 1998) (holding "that claims based on fraudulent concealment or the failure to warn are preempted by federal law")

Hulsey v. *American Brands, Inc.*, No. C-97-003, 1997 WL 271755, at *3 (S.D. Tex. Apr. 7, 1997) (holding fraudulent concealment claim preempted), aff'd per curiam, 139 F.3d 898 (5th Cir. Mar. 2, 1998)

Burton v. *R.J. Reynolds Tobacco Co.*, 916 F. Supp. 1102, 1104 (D. Kan. 1996) (holding concealment claim not preempted because "Defendants had numerous mediums — other than placing warnings on the product itself * * * — to tell the public of the dangers of smoking")

State Cases:

American Tobacco Co. v. *Grinnell*, 951 S.W.2d 420, 439-40 (Tex. 1997) ("The fraudulent concealment claims are pre-empted because they too are premised on American's failure to disclose information regarding the dangers of cigarettes. This claim is essentially a variation on the Grinnells' failure to warn claim because it is based on American's alleged duty to disclose information about the harmful effects of cigarettes.")

Cantley v. *Lorillard Tobacco Co.*, 681 So. 2d 1057, 1061 (Ala. 1996) ("Because manufacturers in the position of the defendants * * * can ordinarily communicate directly with consumers * * * only through 'advertising or promotion' channels of communication, we must conclude that Cantley's fraudulent suppression claims, as pleaded, are inevitably based upon a 'state law duty to disclose * * * facts through * * * advertising or promotion' channels of communication and, therefore, that they are preempted.") (last two omissions in original)

Bullock v. *Philip Morris USA, Inc.*, 42 Cal. Rptr. 3d 140, 159 (Cal. App. 2d Dist. 2006) (upholding admission of evidence regarding cigarette advertising that "conveyed the message that smokers were glamorous, healthy, and carefree," reasoning that "the counts for misrepresentation and false promise were based on false statements and a duty not to deceive and therefore were not preempted")

Whiteley v. *Philip Morris Inc.*, 11 Cal. Rptr. 3d 807, 832-42 (Cal. App. 1 Dist. 2004) (acknowledging that under *Cipollone* "[l]ine drawing is difficult," but holding that claims alleging "misrepresentation by half-truths" are not preempted because they are more like affirmative fraud claims than failure-to-warn claims)

Laschke v. *Brown & Williamson Tobacco Corp.*, 766 So. 2d 1076, 1078 (Fla. Dist. Ct. App. 2000) ("In addition, we hold that the Laschkes' claim for conspiracy to commit fraud

through concealment, which attempts to allege a duty beyond that imposed by the Labeling Act, is also preempted for acts occurring after 1969.")

State of Idaho v. *Philip Morris Inc.*, No. CV-OC-97-03239D, at *5, *13 (Idaho Dist. Ct. Sept. 2, 1998) ("The Labeling Act also preempts any claims that the Defendants concealed material facts regarding the health consequences of cigarettes in their advertising or promotions.").

Evans v. *Lorillard Tobacco Co.*, 22 Mass. L. Rptr. 91, 2007 WL 796175 (Mass. Super. 2007) (holding that fraudulent concealment claim "is 'predicated not on a duty "based on smoking and health," but rather on a more general obligation — the duty not to deceive'")

Carmichael-Foley v. *R.J. Reynolds Tobacco Co.*, No. 98-3694F (Mass. Super. Ct. Dec. 31, 1999) ("The plaintiff's post July 4, 1969 (effective date of act), failure to warn claims are pre-empted by the Federal Cigarette Labeling and Advertising Act. These include a failure to warn or to disclose information to consumers and an intentional failure to do so (e.g. alleged concealment or suppression.")

Thies v. *American Tobacco Co., Inc.*, No. MID-L-10563-98 MT (N.J. Super. Ct. Law Div. May 23, 2000) (holding that "since the first and third counts challenge defendants' alleged failure to disclose information about the health hazards of cigarettes in what undoubtedly constitutes defendants' advertising and promotion after the 1969 effective date of the Labeling Act, they are preempted")

Tomasino v. *American Tobacco Co.*, 23 A.D.3d 546, 807 N.Y.S.2d 603 (N.Y. App. Div. 2d Dep't 2005) (holding that because "the predicate duty underlying the plaintiff's fraudulent concealment claims is a state-law duty not to deceive * * * the [trial court] improperly held that the post-1969 fraudulent concealment causes of action were preempted by the Act") (internal quotation omitted) (omission in original)

Miele v. *American Tobacco Co.*, 2 A.D.3d 799, 770 N.Y.S. 2d 386 (N.Y. App. Div. 2d Dep't 2003) (holding that "the predicate duty underlying the plaintiff's fraudulent concealment claims is a state-law duty not to deceive")

Small v. *Lorillard Tobacco Co.*, 679 N.Y.S.2d 593, 604 (N.Y. App. Div. 1998), aff'd, 698 N.Y.S.2d 615 (1999) ("[P]laintiffs' claims are preempted insofar as they allege fraudulent concealment and failure to warn of the dangers of nicotine, but not insofar as they allege affirmative misrepresentations on which plaintiffs relied to their detriment.")

Inzerilla v. *American Tobacco Co.*, No. 11754/96, 2000WL 34016364, at *8 (N.Y. Sup. Ct. Oct. 27, 2000) ("Pursuant to *Small* v. *Lorillard Tobacco Co[.], Inc.* [*supra*], which interprets the statutory term 'advertising or promotion' of cigarettes in an expansive manner, this court holds that the plaintiff's claim of fraudulent concealment has been federally preempted insofar as it rests on allegations concerning events after 1969.")

Davis v. *Fortune Brands, Inc.*, 187 Misc. 2d 409, 413, 727 N.Y.S.2d 241 (N.Y. Sup. Ct. Sept. 27, 2000) ("If the claim alleges that the defendants were obligated to disclose the concealed facts by means of advertising and promotion, then such claim is pre-empted. However where the 'claims rely on a state-law duty to disclose such facts through channels of communication other than advertising and promotion' those claims are not pre-empted.")

DaSilva v. *American Tobacco Co.*, 667 N.Y.S.2d 653, 656 (N.Y. Sup. Ct. 1997) (finding that *Cipolone* requires preemption of fraudulent concealment claims)

(6)

No. 06-1545

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

R.J. REYNOLDS TOBACCO CO., *et al.*,

Petitioners,

v.

HOWARD A. ENGLE, M.D., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Florida

BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

1. Should the Court exercise certiorari jurisdiction to determine the preclusionary effect of *Engle* findings in putative class members' cases that have not been adjudicated or even filed?

2. Should the Court exercise certiorari jurisdiction to determine federal preemption issues that cannot change the outcome of the case where the class representatives' judgments are supported by specific jury findings of pre-July 1, 1969 negligence, and where the Court will need to examine the two-year evidentiary record to determine issues that were not adequately presented or preserved in the Florida Supreme Court?

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INTRODUCTION

Petitioners, the domestic tobacco industry, arrive from the Florida Supreme Court after successfully challenging the class-wide punitive damages judgment and the compensatory damages judgment of class representative Frank Amodeo. Now petitioners ask this Court to completely erase all traces of the thirteen-year Florida class action that considered the conduct of petitioners and adjudicated the compensatory damages claims of class representatives Mary Farnan and Ralph Della Vecchia, as Personal Representative of the Estate of Angie Della Vecchia. The petition urges this Court to abandon deeply rooted precedent by entertaining petitioners' future hypothetical due process claims *now* and by imposing an *absolute* preemption bar that would grant immunity to tobacco companies for their misconduct.[1]

The questions raised in the petition are not certworthy for multiple reasons. Petitioners ask the Court to intervene in future lawsuits to prohibit trial courts from using certain Phase I findings for the benefit of class members, impermissibly seeking an advisory opinion. Petitioners' due process concerns are premature and not ripe for review. *Nike, Inc. v. Kasky*, 539 U.S. 654, 658 (2003). Significantly, petitioners do *not* challenge the Florida Supreme Court's decision to give preclusive effect to the Phase I findings with respect to addiction and the generic causation of 23 diseases. Pet. at 7-8, n.3. Rather, they only challenge Phase I findings of ultimate fact as to theories of liability. Although the Florida Supreme Court has spoken on the preclusion issue at the urging of petitioners, no court has yet to apply the findings. This Court should not prejudge whether certain class-wide findings are to be given preclusive effect in future actions, none of which have been tried, and most not even filed, because it

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[1] By seeking to vacate the two class representatives' judgments based on federal preemption, judgments supported in part by specific jury findings of negligence *before* July 1, 1969 (App. 200a-204a; T.50385-86), petitioners effectively demand absolute immunity from liability for their wrongdoing.

would require the "premature adjudication of novel constitutional questions." *Nike, Inc.*, 539 U.S. at 658.[2]

The only final *judgment* here is one in favor of two class representatives who recovered compensatory damages in a trial court judgment entered in November, 2000.[3] This court reviews *judgments*, not statements in opinions. *California v. Rooney*, 483 U.S. 307, 311 (1987). Where statements or discussions in an opinion raise constitutional questions, "[t]hat admonition has special force . . . for it is our settled practice to avoid the unnecessary decision of such issues." *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 734-35 (1978). Petitioners concede that no due process issues are presented by the two compensatory damages awards: "The preclusion ruling, which is the subject of the due process challenge, has no effect on those two individuals." Pet. at 1-2. Petitioners' due process assertions relate only to the preclusionary effect of certain Phase I findings in future litigation brought by potential class members. "[F]ederal courts have never been empowered to issue advisory opinions." *Pacifica Foundation*, 438 U.S. at 735. As discussed *infra* the due process issue has not been adequately preserved.

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[2] Petitioners essentially argue that there may be a due process violation *if* a class member files a lawsuit raising the same claims as in *Engle*, and *if* the class member relies in part on certain class-wide findings, and *if* the trial judge gives preclusionary effect to one or more of the findings, and *if* the class member prevails on the remaining issues, including causation, affirmative defenses and damages, and *if* the *Engle* findings played a decisive role in obtaining the verdict, and *if* judgment is entered in favor of the class member. "There are . . . too many 'ifs' in that proposition to make our review appropriate at this stage." *California v. Rooney*, 483 U.S. 307, 312-13 (1987).

[3] Petitioners suggest the "possibility" that Farnan and Della Vecchia, the two class representatives, "may elect to seek punitive damages on remand." Pet. at 1. Class representatives Farnan and Della Vecchia will not be seeking punitive damages. They are in failing health and waive any claims for punitive damages. They only seek to recover their full compensatory damage verdicts with interest pursuant to the November, 2000 final judgment that was reinstated by the Florida Supreme Court.

The decision of the Florida Supreme Court which provided petitioners full relief from the $145 billion class-wide punitive damages verdict and several class-wide findings, came after thirteen years of litigation, multiple appeals and a two-year jury trial with 157 witnesses, hardly a prototype for a denial of due process of law.

Petitioners assert that "the verdicts, both class-wide and in favor of [Farnan and Della Vecchia] . . . were barred by federal preemption" (Pet. at 1), despite specific jury findings of negligence occurring *prior* to July 1, 1969 (App. 200a-204a; T.50385-86), the effective date of the preemption clause of the *Public Health Cigarette Smoking Act of 1969*, 15 U.S.C. §1334(b) ["1969 Act"]. The preemption issue is not ripe for review as to class members whose cases have not yet been adjudicated or even filed. As to Farnan and Della Vecchia, who started smoking and became addicted years before July 1, 1969, preemption does not apply, at a minimum, to the pre-1969 jury findings and claims that are not barred as a matter of law. Thus, nothing the Court can decide on the preemption question can affect the judgments of Farnan and Della Vecchia, rendering the matter clearly uncertworthy. *Coleman v. Thompson*, 501 U.S. 722, 730 (1991).

Certiorari is also inappropriate where a consideration of petitioners' evidentiary-based objections would require a fact-intensive review of the 60,000 page evidentiary record. As for petitioners' objection to the jury instruction on pre-emption in Phase I, that instruction (as well as the preemption instruction given in Phase II-A), was a proper recitation of the law. In contrast, petitioners' proposed instruction was a misstatement of preemption law. Nor have the objections been properly preserved and presented. *See Adams v. Robertson*, 520 U.S. 83, 86 (1997). Petitioners complain that the Florida Supreme Court did not address preemption (Pet. at 29), an issue petitioners relegated to a passing sentence in their fifty-page brief on the merits in the state supreme court: a sentence that did not even cite *Cipollone*,[4] the

[4] *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

principal case on which petitioners now rely. The issue was not preserved for review. *Adams,* 520 U.S. at 86; *Duest v. Dugger*, 555 So.2d 849, 851-52 (1990).

STATEMENT OF THE CASE

Petitioners' Statement contains numerous factual errors, omits essential facts, and distorts the history of this complex state class action litigation and key aspects of the decision of the Florida Supreme Court.

I. BRIEF PROCEDURAL HISTORY

The *Engle* class action was filed in May, 1994 and was certified as a nationwide class of sick smokers and their survivors. The Florida district court of appeal affirmed class certification in 1996 but limited the class to Floridians. "Although certain individual issues will have to be tried as to each class member, principally the issue of damages, the basic issues of liability common to all members of the class will clearly predominate over the individual issues." *R.J. Reynolds Tobacco Co. v. Engle*, 672 So.2d 39, 41 (Fla. 3d DCA 1996). Notice was disseminated by publication throughout Florida in 1997, informing Floridians of the litigation and the common issues trial, and providing class members with the ability to opt-out to avoid being bound by the common findings.

The class action came to trial in July, 1998 pursuant to a trifurcated trial plan providing for "common issues of liability and causation" to be tried in Phase I on behalf of the class, followed by Phase II-A, the class representatives' compensatory damages trial and Phase II-B, the class-wide punitive damages trial. Class members would then proceed (in Phase III) before different juries to determine remaining issues and compensatory damages. R.31276-80. Petitioners defended the common issues' trial, calling 25 witnesses and cross examining 61 witnesses called by the class during Phase I. T.11135-34678. The twelve-page special interrogatory verdict form included questions regarding the generic causation of 23 diseases associated with cigarette smoking, a question on addiction, and a series of questions as to ultimate

factual issues presented under each theory of liability, including differing time frames. The verdict form had over 240 questions, including subparts. App. 192a-206a. The jury, which heard Phase I evidence for close to a full year, deliberated for seven days and answered all the questions.[5]

During the Phase II-A trial, the same jury considered claims of three class representatives, Mary Farnan, Frank Amodeo and Angie Della Vecchia.[6] The Phase II-A eighteen-page single-spaced verdict form had 276 questions, including sub-parts. The jury found in favor of the class representatives on most issues, tempered by comparative fault. Farnan was awarded $2,850,000, and the statutory beneficiaries of Della Vecchia, a total of $4,023,000. T.50373-91. The trial court's Final Judgment and Omnibus Order of November, 2000 found that the jury's verdicts were based on "an enormous amount of evidence" and that "after sitting for two years in trial, it is inconceivable that this jury ignored or misconceived the evidence or the merits of the case." App. 182a.

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[5] Petitioners, citing various transcript pages, mischaracterize the Phase I *Engle* trial as "sprawling proceedings," where "respondents purported to substantiate their negligence and product defect claims by referring to scores of different cigarette types and brands marketed at different times by different manufacturers." Pet. at 15. But that evidence, which was from petitioners' agents and representatives, constituted largely irrelevant testimony introduced by petitioners to confound and obfuscate the issues. The litigation was focused on the petitioners' methods of addicting class members to cigarettes and keeping them addicted.

[6] Petitioners asserted that Farnan's lung cancer was of a type (bronchiolalveolar carcinoma) that had been found by the jury in Phase I not to be caused from smoking. T.38812-27. According to petitioners, Della Vecchia's lung cancer that metastasized to her brain and caused her death, was actually scar tissue unrelated to cigarette smoking. T.42730-37. Similarly, they argued that Amodeo's laryngeal cancer, that was diagnosed in 1987 and caused him to be unable to eat or drink anything by mouth since that time and to receive all nourishment through a feeding tube, was caused by "wood dust." T.38865-68. The jury rejected those defenses. However the jury found that Frank Amodeo knew or should have known that his throat cancer was caused from smoking and that he was addicted to smoking prior to May, 1990, precluding him from recovery under Florida's statute of limitations. The jury findings as to Amodeo were upheld by the district court and the Florida Supreme Court.

The Florida district court of appeal reversed the class certification that it previously upheld, barred all punitive damages claims, vacated the compensatory damage judgments of the three class representatives, and reversed on additional alternative grounds. App. 68a-126a. The Florida Supreme Court quashed the district court's misapplication of res judicata with respect to its erroneous extinguishment of punitive damages claims, reinstated class certification for Phases I and II-A, ordered that the class be *prospectively* decertified on remand for remaining class members' issues, reinstated two of the three compensatory damages awards (against all petitioners except Liggett and Brooke (App. 43a)), but vacated the class-wide punitive damages award.[7] The Florida Supreme Court wrote: "[A] review of the verdicts reveals that each verdict reflected a careful and differentiated analysis as to comparative fault and individual damages and in no way justifies the Third District's overall conclusion that this was a runaway jury." App. 39a. At the request of petitioners, the court also considered the future effect of the class-wide Phase I liability findings, determining that certain findings would *not* be given preclusive effect in class members' future actions, i.e., (i) fraud and misrepresentation, (ii) conspiracy to commit fraud, (iii) intentional infliction of emotional distress and (iv) entitlement to punitive damages.[8]

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[7] The decision analyzed the extended procedural history of *Engle*, (noting that the district court in *Engle II* had misapplied Florida's doctrine of law of the case), explained the absence of choice of law issues where only Florida law applies, and discussed the reasons why the court reinstated class certification. App. 23a-33a. It is disingenuous for petitioners to suggest that the Florida Supreme Court "concluded, with no analysis, that the trial court did not abuse its discretion in certifying the class." Pet. at 9-10. It is also misleading for petitioners to state that the Florida Supreme Court "recognized that class action treatment was inappropriate and ordered the class decertified." Pet. at 1-2. Rather, the court found that class treatment was proper for completed Phases I and II-A but inappropriate for future proceedings involving only individual issues.

[8] Petitioners (other than Liggett and Brooke) have never challenged the sufficiency of the evidence to support the Phase I or Phase II-A findings in any appellate forum below; nor do they do so here.

II. THE PETITION OMITTED ESSENTIAL FACTS BEARING DIRECTLY ON THE QUESTIONS PRESENTED

Pursuant to U.S. Sup. Ct. Rule 15, the following additional facts, the significance of which is explained more fully *infra*, constitute further reasons for denying the petition.

Due Process: Petitioners' due process argument is predicated on their objections to the Phase I special interrogatory verdict form that they describe as too "generalized." Pet. at 1. But a special interrogatory verdict form was used, not a general verdict. It is also inaccurate for petitioners to suggest that the trial court "adopted respondents' generalized [verdict] form." Pet. at 7. As discussed *infra*, petitioners had substantial input in developing the verdict form that was used.

Contrary to their position here, petitioners had previously proposed far more general questions for the Phase I verdict form than the questions of ultimate fact contained in the verdict form that was used. R.33722-33811. Although *R.J. Reynolds Tobacco Company* represented to the trial court that it was "incumbent upon all of us" to provide additional "enumerated" statements for a more detailed verdict form (T.35954), petitioners never did so. Despite being repeatedly requested to do so by the trial court, petitioners failed to submit a feasible alternative verdict form. R.49258-72; 49296-49322; T.35967-68. Petitioners also objected to a series of additional questions proposed by the class which were based on allegations in the amended complaint. R.49258-72; T.35967. Petitioners Brown & Williamson Tobacco and American Tobacco announced their preference for the verdict form that was used as a "middle ground," although they now challenge it in their due process argument. T.35969.

The petition portrays the preclusion ruling as an extraordinary event, but when petitioners thought they would prevail on the merits in Phase I, they repeatedly acknowledged the preclusionary effect of the findings, proclaiming: "[I]f the defendants win, we want as many people as possible

bound" (R.10708-10809 at 96) and if the jury answers "no . . . then not a single Florida smoker can recover." T.36007.[9]

Preemption: In their brief on the merits before the Supreme Court of Florida, petitioners included one sentence on preemption, without a reference to *Cipollone*, not preserving that issue for review. Here, petitioners' preemption arguments challenge *all* claims, but petitioners argued otherwise in the trial court. There, petitioners sought *only* partial summary judgment on preemption issues, asserting that limited portions of certain claims were subject to federal preemption under *Cipollone* and the *1969 Act*. R.12960-63; 12974-13066. Their pretrial motion was granted in part and allegations were stricken from various counts, including the fraud and conspiracy claims, refuting petitioners' argument here that "the incantation of these words [fraud, conspiracy, etc.] sufficed to defeat petitioners' preemption defense." Pet. at 24. Moreover, until now, petitioners acknowledged that not all *Engle* claims were preempted: "[T]here is no contention that . . . [the *1969 Act*] preempts express warranty or affirmative fraud, misrepresentation, or conspiracy for affirmative fraud, misrepresentation" (T.48171, 48290); "Defendants have not tried to argue that all of plaintiffs' claims are preempted." R.15243-51. Petitioners' pre-trial motion for partial summary judgment did *not* seek to preempt any allegations as to why smokers start to smoke, including allegations of youth marketing, nor did they seek to

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[9] Although they now attack the Phase I findings through their due process argument, petitioners told the jury during Phase II-A that "Your verdict is in. We accept it. It's over with. It's there forevermore" (T.38829) and will "resonate forever" to enable "other class members, however many thousands or hundreds of thousands it may be . . . [to] recover," and "ensure that all class members have a day in court." T.38878, 38896-97. The petition asserts that the "jury's findings provide no clue" as to petitioners' misconduct (Pet. at 16), but during the punitive damages phase their theme was each defendant "has gotten the message," (T.51366); we know what we did wrong and we have changed and should not be punished. T.51072-73; 51085; 51253-54; 51366; 57201; 57407; 57483; 57514; 57596. Dan Webb, lead counsel for Philip Morris, argued that Philip Morris' CEO "is going to tell you he understands your verdict very very well. He is not going to tell you he does not know what your verdict means. He is not going to tell you that at all." T.51085.

preempt in whole or part the claims of breach of implied warranty and express warranties. R.12974-13066.

Petitioners fail to disclose that the two compensatory damages judgments are also supported by specific jury findings in Phases I and II-A of negligence that occurred *before* July 1, 1969 (App. 200a-204a; T.50385-86), findings that are not subject to federal preemption. In support of their evidence-based preemption argument, petitioners now challenge evidence that was admitted in response to their defenses of consumer expectations and awareness of the risks of smoking. Although petitioners argue here that such evidence is "functionally equivalent" to claims preempted in *Cipollone* (Pet. at 20-24), they announced at the beginning of the trial that "this case [is] about what people knew about the health risks of smoking when they made the choice to smoke," (T.10950), and "Why [do] young people smoke?" T.10956. "[T]he issues in this case [are] whether smokers can quit [and] why smokers start smoking." T.37410.

Although petitioners object to the Phase I jury instructions on preemption, which represented a combination of the litigants' submissions, class counsel twice offered to modify the instruction: "I have volunteered to take out the language they had a problem with," (T.36285, 36152-53), but petitioners declined: "I don't think a shortened instruction . . . is an appropriate way to go." T.36153. So the trial court gave the longer combined instruction on preemption. T.37569-70. The petition also ignores the more expansive Phase II-A preemption instruction given during the Farnan and Della Vecchia trials that included the "neutralization" language petitioners now mistakenly assert was lacking, writing incorrectly: "[T]he court gave an instruction that said nothing about neutralization." Pet. at 24, n.10 and 8-9.

REASONS FOR DENYING THE PETITION

I. THE COURT SHOULD NOT ADDRESS PETITIONERS' HYPOTHETICAL DUE PROCESS CLAIMS

Petitioners concede that "[t]he preclusion ruling, which is the subject of the due process challenge, has no effect" on class representatives' Farnan and Della Vecchia who have a final judgment.[10] Thus, the posited due process issues apply only to purported class members in future cases that have not yet been tried (or not filed). No absent class member has a judgment that depends on the preclusion ruling that petitioners challenge here. No court has yet to even apply the findings. Moreover, petitioners concede that preclusion is proper with respect to the general causation and addiction findings. Thus, the question posed is *not* whether the Phase I findings can or should be given preclusive effect, but rather, whether giving preclusive effect to certain findings may, *in the future*, implicate due process.

A. The Due Process Claim Is Not Ripe for Review

Petitioners' claim of future due process violations is illusory and speculative. It is not tied to any class member with a judgment, or even a determination of liability. App. 18a. Petitioners fail to demonstrate "actual prejudice" because their "due process claims are speculative and premature." *U.S. v. Marion*, 404 U.S. 307, 325-26 (1971). When considering a claim of a due process violation, "[t]he

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[10] Where petitioners do *not* challenge the use of the Phase I findings in the Phase II-A trials of Farnan and Della Vecchia before the same jury, it is apparent that petitioners' "extreme application of the doctrine of res judicata" argument is a disguised Seventh Amendment re-examination argument, which also explains petitioners' reliance on *Gasoline Prods. Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931), a re-examination decision. Pet. at 17. The Florida Supreme Court found there was no violation of Article I, §22 of the Florida Constitution, noting that the Seventh Amendment does not apply to actions brought in state court. App. 31a-32a. *See Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 432 (1996) ("The Seventh Amendment ... governs proceedings in federal court, but not in state court.").

criterion is not the possibility of conceivable injury." *Dusenberry v. U.S.*, 534 U.S. 161, 170-71 (2002), citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950). *In accord*, *U.S. v. Lovasco*, 431 U.S. 783, 790 (1977) ("Proof of prejudice is generally a necessary but not sufficient element of a due process claim"); *U.S. v. Valenzuela-Bernal*, 458 U.S. 858, 868-69 (1982) (same). If a lower court ever upholds a specific verdict in favor of a plaintiff/class member, in which the preclusive effect of a finding approved by the Florida Supreme Court is decisive, petitioners may choose to seek review with respect to the new judgment where all the facts are known.[11]

A writ of certiorari was dismissed as improvidently granted in *Nike, Inc.*, 539 U.S. at 667, 663, "[a]fter receiving 34 briefs on the merits (including 31 *amicus* briefs) and hearing oral argument." "[T]his Court will not anticipate a question of constitutional law in advance of the necessity of deciding it. . . . The novelty and importance of the constitutional questions presented in this case provide good reason for adhering to that rule." *Id.* That reasoning applies here since a review of the due process and preemption issues that have been raised as to class members requires "the study of a full factual record." *Nike*, 539 U.S. at 664-65 (Stevens, J., concurring). The due process claims (as well as the preemption claims as to putative class members) are plainly premature and the Court should deny review for that reason alone. *See also California v. Rooney*, 483 U.S. 307, 311-14 (1987) (refusing review where "too many 'ifs'" were present and later review available if the "ifs" became reality).

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[11] It is disingenuous for petitioners to suggest that "defendants' defenses would be reduced to a charade" were this Court to deny certiorari. Pet. at 4. Class members must still establish liability in individual cases. Since the state supreme court decision, there have been fewer than 100 cases filed, including the cases referenced in the petition (Pet. at 18-19 and n.8), where petitioners have raised 24 affirmative defenses, including federal preemption, and have also challenged the preclusive effect of certain *Engle* Phase I findings.

Not everything contained within an opinion of the state's highest court is subject to review by certiorari.[12] This Court reviews judgments, not statements in opinions. *Johnson v. De Grandy*, 512 U.S. 997, 1003, n.5 (1994); *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 734-35 (1978) (the admonition that the Court reviews judgments, not statements in opinions, "has special force when the statements raise constitutional questions, for it is our settled practice to avoid the unnecessary decision of such issues.... Federal courts have never been empowered to issue advisory opinions.").

There is no extant *judgment* in favor of class members or unnamed plaintiffs in future lawsuits. "When this Court reviews the state court's decision on direct review pursuant to 28 U.S.C. §1257, it is reviewing the *judgment*; if resolution of a federal question cannot affect the judgment, there is nothing for the Court to do." *Coleman*, 501 U.S. at 730. The only individuals with *judgments* are respondents Farnan and Della Vecchia. The petitioners concede that nothing this Court could do *vis a vis* petitioners' due process claim can affect those judgments.

B. There Has Been No Possible Deprivation Of Petitioners' Due Process Rights

"The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). *See also Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). The cases relied upon by petitioners for their "extreme

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[12] The Court noted in *Matsushita Electrical Industrial Co., Ltd. v. Epstein*, 516 U.S. 367, 375 (1996) that "usually, a state court will not have occasion to address the specific question [of] whether a state judgment has issue or claim preclusive effect in a later action ... ", citing *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 381-82 (1985). Although the district court opinion did not address the verdict forms or the Phase I findings, petitioners challenged the verdict forms and findings in the state supreme court, asking that court to hold that the "generalized verdict ... cannot be used to determine anyone's claims in Phase III (or in any individual suit)." Brief on Merits at 21, 27-28. The court's consideration of the preclusive effect of the findings, at petitioners' urging, does not change the rule that this Court will not review premature and hypothetical issues.

application of the doctrine of *res judicata*" argument, raise due process concerns when a litigant, who was *not* a party to an earlier proceeding, is nonetheless bound by the judgment. *See Richards v. Jefferson County*, 517 U.S. 793, 797 (1996) (judgment in prior action is not binding on individuals who "neither participated in, nor had the opportunity to participate in," prior case); *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160, 168 (1999) (plaintiffs in second case were strangers to earlier litigation and judgment); *Hansberry v. Lee*, 311 U.S. 32, 40-46 (1940) (absent parties who had no notice or opportunity to participate in prior litigation not bound where class representatives had actual conflict with absent class members' interests). Here, petitioners have fully defended through trial and appeal and cannot claim any violation of the right to be heard.[13]

C. Due Process Issues Have Not Been Adequately Preserved

Under federal and Florida law, petitioners have not adequately raised and preserved their due process arguments that are predicated on their objections to the Phase I special interrogatory verdict form.

The verdict form used was not a general verdict but rather a special interrogatory verdict form pursuant to Florida law, with multiple questions broken down by defendants under different time frames, as requested by petitioners.[14] The verdict form that was used included changes requested by petitioners,

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[13] None of the cases relied upon by petitioners lend support to their due process argument. For example, in *Fayerweather v. Ritch*, 195 U.S. 276, 307 (1904), the Court held that an earlier judgment was properly given *res judicata* effect although there were no formal or special findings of fact. Thus, a true general verdict, without the *Engle* verdict form's breakdown of legal issues and ultimate issues of fact, was nevertheless given *res judicata* effect through "an examination of the record." *Id.* at 307.

[14] *See Flores v. Allstate Ins. Co.*, 819 So.2d 740, 743 (Fla. 2002); *Standard Jury Civil Cases (No. 98.1)*, 711 So.2d 1 (Fla. 1998). It was not a "generalized" verdict with "vague jury findings," contrary to petitioners' mischaracterization. Pet. at 1, 3.

i.e., the inclusion of subcategories of diseases under the generic causation question, deletion of references to causation in the other questions, modification of the Florida standard jury instruction for negligence, insertion of language in the express warranty count and the adoption of petitioners' question on entitlement to punitive damages. The verdict form represented a compromise of the litigants' positions. Petitioners now challenge questions they urged the trial court to adopt. For example, in discussing the finding of negligence, petitioners now state: "This finding is a cipher" (Pet. at 16), but petitioners argued below that the same question was very meaningful because "an adverse finding is very harmful to the defense . . . where the question is exactly what the trial plan says we're supposed to be trying [and] . . . it's not a happy event if that's decided against us." T.35918-19.

Petitioners have also been inconsistent with respect to the common issues to be tried during the Phase I trial, taking multiple varying positions, contrary to Florida law. *See McKee v. State*, 450 So.2d 563, 564 (Fla. 3d DCA 1984); *Salcedo v. Asociacion Cubana, Inc.*, 368 So.2d 1337, 1338-40 (Fla. 3d DCA 1979). Petitioners first proposed the "more manageable issue": "Was it common knowledge among the class . . . that smoking carried significant health risks and that some people find smoking difficult to stop?" R.20712.[15] Then petitioners proposed addressing only addiction issues: "[W]hat we ought to do is try the issue of whether or not all the members of this class are unable to quit smoking because they are addicted to nicotine. . . . Because if the defendants win on those issues, we can all go home." R.13653-54. Petitioners subsequently submitted a proposed verdict form with six general questions, including: "Was the 'Special Projects' division of the Council for Tobacco Research established for the purpose of concealing medical

[15] Petitioners argued below that the "common knowledge" issue was "dispositive of the product defect claim . . . because if the product is not more dangerous than expected by the ordinary consumer, it is not defective." *Id.*

research under the misuse of the attorney-client privilege? Yes __ No ___" R.33772-33811.[16]

In their reply brief before the district court, petitioners acknowledged that "[a] generalized verdict form may be appropriate even in a bifurcated class action with separate juries, if the pleadings and proof provide sufficient particularity to establish precisely what the jury found to be unlawful." Reply Brief at 32. Petitioners now say the opposite: "The highly generalized and decidedly ambiguous nature of these findings prevents any other jury from applying them consistent with due process." Pet. at 16.[17] Petitioners ultimately proposed a "blank-line" verdict form with narrative questions where the jury would be required to provide extensive identifying information about specific scientific studies, including dates, times and locations, as well as other evidentiary data; an overwhelming task for a jury following a one-year trial with thousands of pages of exhibits and testimony from 86 witnesses in Phase I alone.[18]

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[16] Petitioners' proposed question addressed the concealment of medical research and is also inconsistent with petitioners' argument here that all concealment claims are preempted under *Cipollone* (Pet. at 21-22), a position refuted by *Cipollone*, 505 U.S. at 530 and n.28.

[17] But even if this were a general verdict form, which it is not, the Court recognized in *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 569-72 (1951) that a general verdict may be given preclusive effect with "an examination of the record, including the pleadings, the evidence submitted, the instructions under which the jury arrived at its verdict, and any opinions of the court," relying on *Sealfon v. U.S.*, 332 U.S. 575, 578 (1948). *In accord, Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 484-85 (1968) (general verdict in action brought by U.S. under anti-trust laws was given preclusive effect in subsequent private action for treble damages, relying on *Emich*). Cases cited by petitioners also hold that extrinsic evidence may be properly considered when giving preclusive effect to a "general" verdict. *See De Sollar v. Hanscome*, 158 U.S. 216, 221 (1895), citing *Russell v. Place*, 94 U.S. 606, 608 (1876). *See also Fayerweather*, 195 U.S. at 307 (res judicata effect after an "examination of the record"). Subsequent courts may properly examine the record here, if further detail is warranted.

[18] The Second Circuit rejected a "blank-line" interrogatory verdict form where there had been over 150 exhibits and 25 witnesses because completing the verdict form would "require the jury to perform super

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In June, 1998, prior to the commencement of trial, the trial judge advised petitioners that their proposed open-ended verdict form was unacceptable.[19] Defense counsel tentatively agreed to revise the verdict form so that the jury can "choose" rather than fill-in-the-blanks (R.36273-76), but defendants never did so.[20]

Petitioners also objected to a series of interrogatory questions taken from allegations in the amended complaint, to be answered "yes" or "no." R.48404-17; T.35950-51; T.35967-68. Petitioners declined the trial court's repeated invitation to revise the verdict form, saying that it was not "defendants' job" to prepare and submit an acceptable form. T.36298-99.[21] The trial court responded: "We are just going around in circles." T.35971. In exercising his broad discretion, he utilized a special interrogatory verdict form that was a combination of the litigants'

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human acts of memory," and "demand of the jury a recall of Homeric proportions." *U.S. v. Ogando*, 968 F.2d 146, 148-49 (2d Cir. 1992).

[19] The trial court stated that "You can go ad infinitum before you get an answer to . . . 'Identify the scientific studies concealed by the defendants and when such studies were concealed.'" R.36226-92 at 44-45. "[L]eaving a question like that open-ended to a jury could have results you can't even think about. . . . [R]ather than leave an open-ended question, you can make a list of those studies which were either proven or at least brought up . . . [a]nd pick off which one." R.36318-19.

[20] Counsel for *R.J. Reynolds Tobacco* similarly said to the trial court that it was "incumbent upon all of us" to make certain changes to the verdict form for Phase I, including "enumerated" misstatements that the jury would consider (T.35954). Petitioners never acted on that incumbency.

[21] Petitioners were wrong. Florida law requires that a litigant who objects to a verdict form present a reasonable alternative to preserve his objection. *See J.T.A. Factors, Inc. v. Philcon Services, Inc.*, 820 So.2d 367, 371-72 (Fla. 3d DCA 2002) (it was within the discretion of the trial court to reject "*J.T.A.*'s more complex interrogatory verdict form"); *S & S Toyota Inc. v. Kirby*, 649 So.2d 916, 918 (Fla. 5th DCA 1995) (burden is on litigant that requests a particular type of special verdict form to propose and offer a form with the requisite findings); *Whitman v. Castlewood Int'l Corp.*, 383 So.2d 618, 619-20 (Fla. 1980) (same); *E.F. Hutton v. Sussman*, 504 So.2d 1372, 1373 (Fla. 3d DCA 1987) ("it was *Hutton*'s burden to offer special verdict forms, which would have required the finding *Hutton* now complains was lacking, and since it failed to do so, we find no error").

proposals. R.48564-78; 35903-05; 35987; 35994-36005; 35900-01; 35942; R.49075-49123. *Brown & Williamson Tobacco* and *American Tobacco* preferred the special interrogatory verdict form ultimately used, rather than the more specific interrogatory questions prepared by the Class, referring to the former as a preferable "middle ground." T.35969. There was no error, and certainly no preservation of arguable error of constitutional dimension.

Finally, the litigants always recognized that the Phase I class-wide common issues verdict was intended to be given preclusive effect in subsequent Phase III individual trials pursuant to *Engle I* and the trial plan. Petitioners told the jury in Phase II-A that every class member would have a day in court because their Phase I findings were "forevermore" and would "resonate forever." T.38829-38878, 38896-97. And up until the time the jury returned its Phase I verdict, petitioners repeatedly acknowledged and requested that all Floridians be bound by the Phase I verdict and by the questions answered "No." Defense counsel argued during Phase I that if the jury answered "No" to a particular question "then not a single Florida smoker can recover." T.36007. Petitioners' *heads I win, tails you lose* concept of due process is unacceptable. Moreover, it cannot be the basis for certiorari review.[22]

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[22] A further example of petitioners' one-sided view of the class action was their urging an expansive notice program to ensure that all absent class members would be bound by the Phase I verdict: "If the defendants win, we want as many people as possible bound;" "We expect to win the case. When we win the case, I want to be able to say, 'You're bound by it . . . I want them bound'." "[W]hen defendants prevail in this case, the absent class members will be bound." R.10804; 9809.

II. CERTIORARI SHOULD BE DENIED ON THE PREEMPTION ISSUES BECAUSE THEY WERE NOT ADEQUATELY PRESENTED IN THE STATE SUPREME COURT; THEY REST ON CLAIMS OF IMPROPER ADMISSION OF EVIDENCE WHICH ARE BOTH FACTUALLY AND LEGALLY WITHOUT MERIT; AND THE ULTIMATE OUTCOME OF THE CASE WILL NOT BE AFFECTED BECAUSE THE JUDGMENTS ARE SUPPORTED BY SPECIFIC JURY FINDINGS OF PRE-JULY 1, 1969 NEGLIGENCE.

A. Petitioners Did Not Adequately Present and Preserve Preemption Before The Florida Supreme Court

Petitioners seek review of their preemption issue, but the preliminary question is whether preemption was adequately preserved and presented to the state supreme court. "[W]e have adhered to the rule in reviewing state court judgments under 28 U.S.C. §1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997), citing *Yee v. Escondido*, 503 U.S. 519, 533 (1992). Where "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due for want of proper presentation." *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983), citing *Fuller v. Oregon*, 417 U.S. 40, 50 n.11 (1974). Although acknowledging that the Florida Supreme Court did not address the issue of preemption, other than with a "fleeting reference" (Pet. at 10, n.4), petitioners say they properly addressed the issue in their brief on the merits before the Florida Supreme Court (Pet. at 11, n.6), and that the "failure to address the preemption issue does not render this case unworthy of review." Pet. at 29. Petitioners do not disclose that their "briefing" on

preemption consisted of a single sentence in a 50 page brief.[23]

On page 49 of their brief on the merits, petitioners limited their preemption argument to this sentence as part of a paragraph and footnote that raised *nine* other issues: "For example the trial court improperly allowed plaintiffs to assert claims preempted by federal law." That does not preserve the point. *See Beck v. Washington*, 369 U.S. 541, 553 (1962) and *Sag Harbour Marine, Inc. v. Fickett*, 484 So.2d 1250, 1256 (Fla. 1st DCA 1986).[24] Under Florida law, an issue is not preserved for review by referencing arguments made in other briefs or pleadings. *Duest v. Dugger*, 555 So.2d 849, 852 (Fla. 1990) ("Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived.").[25] U.S. Sup. Ct. Rule 14(g)(i) requires that petitioners seeking review in cases from state courts specify:

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[23] Perhaps petitioners were reluctant to argue their federal preemption issue before the state supreme court because during the Phase I trial, petitioners' CEOs and witnesses testified that the federally mandated warnings on cigarettes were *not true* (T.14222-23; 15301; 19322-23; 19901); that science does not know the cause of lung cancer and cigarette smoking has not been proven to be a hazard with respect to lung cancer (T.28216; 28138); that smoking is not addictive – it is as addictive as eating "gummy bears" or "carrots," and that anyone can quit smoking. T.14223; 14765; 14780; 15790-92; 20797-98; 21407-08. Petitioners asserted during Phase I that smoking does not cause disease and that the Surgeons General and their Reports were wrong. T.14218-19; 15293-94; 20392-93; 20562.

[24] It is presumptuous for petitioners to suggest that the Florida Supreme Court "abdicated its responsibilities by affirming judgments contrary to the federal constitution and statutes without addressing those claims" (Pet. at 29), when the preemption claim was not properly raised before that court. Moreover, the Florida Supreme Court did mention preemption in a sentence explaining, consistent with *Cipollone* and the *1969 Act*, that "[a]lthough compliance with the federal warnings preempted *any* claim based on failure to warn, it did not *eliminate* the other causes of action that the jury had to consider in Phase I." (Emphasis supplied.) App. 38a. That *Cipollone* and the *1969 Act* do not preempt all claims is clearly a correct statement of the law.

[25] The Florida Supreme Court has repeatedly held that issues are waived and not properly preserved if presented as a "conclusory argument." *See Jones v. State*, 928 So.2d 1178, 1182 (Fla. 2006) ("other

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> The stage of the proceedings, both in the court of first instance and in the appellate court, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record . . . so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgments on a writ of certiorari.

Petitioners do not even attempt to make that showing with respect to their evidence-based preemption issues. Pet. at 21-23. They have not demonstrated that the evidence was *not* properly admitted on non-preempted grounds, to counteract petitioners' defenses of consumer expectations, consumer awareness and why smokers start smoking.

Petitioners erroneously state that the Florida district court of appeal "did not address petitioners' . . . Labeling Act preemption." Pet. at 3, 29. But the issue was addressed by that court in connection with petitioners' jury nullification argument (App. 106a-107a and n.35). On that point, the Florida Supreme Court disagreed, finding that "[T]hese arguments were not an attempt to tell the jury to ignore the law." App. 39a.[25]

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claims present merely conclusory arguments insufficient to state an issue"); *Anderson v. State*, 822 So.2d 1261, 1268 (Fla. 2002) ("Anderson failed to brief and explain what the alleged cumulative errors are, and what their impact is on this case. Thus, the claim is waived."); *Randolph v. State*, 853 So.2d 1051, 1063, n.12 (Fla. 2003) ("References to arguments below without further elucidation does not suffice to preserve issues and these claims are deemed to have been waived."); *Farina v. State*, 937 So.2d 612, 617 (Fla. 2006) ("Claim 6 (cumulative errors deprived Anthony of a fair trial) presents a conclusory argument insufficient to state an issue."); *Donald v. State*, 952 So.2d 484, 489 (Fla. 2007) ("We reject several other claims that present merely conclusory arguments insufficient to state an issue.").

[25] Because the Florida district court of appeal did not reverse on the preemption issues, although it did address one aspect of petitioners' preemption arguments, petitioners now contend that the district court showed a "manifest disregard . . . for federal preemption . . . [and] acquiesced in the subversion of controlling federal law." Pet. at 29. But it is more likely that the district court found petitioners' fact-bound

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Petitioners object to the instruction on preemption, but their argument here has not been properly presented or preserved. Petitioners assert that "the court gave an instruction that said nothing about neutralization" (Pet. at 24, n.10), but the relevant preemption instruction given in connection with the trials of Farnan and Della Vecchia's claims, stated in part: "Federal Law . . . preempts any claim that cigarette advertising and promotion neutralized the federally mandated warnings after July 1, 1969." T.50252-54. The jury instructions on preemption that were given at petitioners' request during Phases I and II-A were a combination of the parties' submissions. Class counsel had twice offered to modify the language in their proposed "failure to warn" instruction, "I have volunteered to take out the language they had a problem with," (T.36285), but petitioners declined the offer, rejecting the "shortened instruction." T.36153. Petitioners' proposed preemption instruction in the common-issues trial (App. 190a-191a) was highly argumentative and erroneously suggested that *all* claims against tobacco companies are barred after July 1, 1969, contrary to *Cipollone*. *See* T.36148-36155; 36279. Petitioners' proposed instruction refused to acknowledge that certain post-July 1, 1969 evidence was properly admitted on non-preempted grounds (i.e. relevant to consumer expectations, consumer awareness and why smokers start to smoke), and sought to erroneously instruct the jury, without limitation, "to ignore any such claims or suggestions or evidence." App. 191a.

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evidentiary and jury instruction preemption arguments to be without merit, particularly where the jury's specific pre-July 1, 1969 findings of negligence, at a minimum, are *not* preempted and those negligence findings alone fully support the verdicts and judgments. App. 200a-204a; T.50385-86. Moreover, the intermediate appellate court's reasons for not addressing the preemption issues in more detail is not relevant to any issue before this Court.

B. The Claims Of Improper Admission Of Evidence Do Not Present An Appropriate Question For Review In This Court

Although nearly silent on the matter of preemption before the state supreme court, petitioners now challenge "the verdicts, both class-wide and in favor of two individual respondents" (Pet. at 1), on the basis of selected trial evidentiary rulings and a jury instruction. But petitioners ignore the fact that the jury also found them liable on pre-1969 failure to warn claims that are not subject to preemption. App. 200a-204a. They engage in selective and partial recitation of certain evidence admitted at trial, while ignoring the context and the record as a whole, violating basic appellate and evidentiary principles, including the discretion of Florida state court judges in determining the admissibility of evidence. Petitioners do not limit their challenges here to the judgments of Farnan and Della Vecchia, arguing that absent class members' future hypothetical claims should also be preempted, without any information about those claims including whether the claimants started smoking before or after July 1, 1969.

Essentially, petitioners seek to undermine *all* of the claims, including future claims, by equating snippets of evidence during a two-year trial to the limited *claims* in *Cipollone* that this Court found preempted (e.g. failure to warn post-July 1, 1969 and neutralization of federally mandated warnings). But federal preemption under *Cipollone* and the *1969 Act* relates to the preemption of *claims*, not *evidence*. "[W]e must look to each of petitioners' common-law *claims* to determine whether it is in fact preempted." (Emphasis supplied). *Cipollone*, 505 U.S. at 523.[27]

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[27] Preemption issues are ordinarily raised and determined prior to trial. Here, the trial court entered a partial summary judgment finding that certain allegations under various claims were preempted. Significantly, in their February, 1997 motion seeking *only partial* summary judgment, petitioners did not assert that any claims in their entirety were preempted, but only paragraphs or subparagraphs within limited claims, representing approximately 20% of the 154 paragraphs in the amended class action complaint. R.12960-63; 12974-13066. Petitioners did *not* seek to preempt the allegations in the complaint relevant to their defenses of

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And even as to those snippets of challenged evidence, petitioners do not attempt to demonstrate that (a) a proper objection was made in the record for each item, (b) the admission of the evidence raised preemption problems, (c) the evidence was not admissible on some other basis that did not raise preemption issues, and (d) the evidence was not merely cumulative of properly admitted evidence, so that any error is rendered harmless.

Petitioners challenge evidence that was admitted in response to petitioners' "awareness" and "consumer expectations" defenses; evidence that was addressed by petitioners beginning in their opening statements: "What this case is about [is] what people knew about the health risks of smoking when they made the choice to smoke," (T.10950); "Why [do] young people smoke?" (T.10956); "What people knew?" (T.10957).[28] *Cipollone* and the *1969 Act* were never intended to strip claimants of their ability to refute and respond to petitioners' consumer awareness and consumer expectations defenses.

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consumer awareness and why smokers start to smoke, including allegations of marketing to youth (R.12974-13066, paragraphs 45(kk)(ll)(nn)(zz), 73, 80, 110, 119), and did not challenge certain claims at all (e.g., breach of implied warranty and express warranty). R.12974-13066. Petitioners do not challenge the order granting partial summary judgment here.

[28] During opening statements, defense counsel also addressed the issue of whether cigarettes are defective, arguing that the jury will be asked to determine "whether or not the average consumer was aware of the risks of smoking, [the] health risks." 11070-71. During opening statements in Phase II-A "awareness" issues were once again center-stage (T.38777): "Information regarding the health risks associated with smoking were available to Mrs. Farnan virtually from the time she began to smoke throughout all of the intervening years" (T.38779); "Mrs. Farnan was aware of the risks of smoking throughout all of the time that she smoked" (T.38825); "You're going to find out what two individual people knew about whether smoking was risky or not" (T.38878); "[W]hy both of these folks began smoking." T.38900. In discussing the Phase II-A verdict form during closing arguments in the compensatory damages trial of Farnan and Della Vecchia, defense counsel said to the jury: "Awareness evidence applies to a whole bunch of different questions that you're going to be asked" (T.37275-76), and "the issues in this case [are] whether smokers can quit [and] why smokers started smoking." T.37410.

Because petitioners' preemption argument is predicated on the admission of evidence at trial and therefore fact-specific, this Court would need to examine the evidentiary record in order to make factual determinations on disputed points.[29] That use of certiorari is unavailing. *See Goodman v. Lukens Steel Co.*, 482 U.S. 656, 664 (1987) ("we are not inclined to examine the record for ourselves absent some extraordinary reason for undertaking this task"); *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 841 (1996) (Court would not undertake to review "lengthy and complex record . . . reached after a 3-week trial"); *N.L.R.B. v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 177 (1981) (certiorari was improvidently granted where the Supreme Court is "presented primarily with a question of fact which does not merit Court review"); *U.S. v. Johnston*, 268 U.S. 220, 227 (1925) ("we do not grant certiorari to review evidence and discuss specific facts.").

C. Key Factual Premises Upon Which The Preemption Claims Are Based Are False

Petitioners argue that "[r]espondents' claims are functionally equivalent to those held preempted in *Cipollone*," (Pet. at 20) and then misstate the *Engle* evidence and theories of liability in order to support their erroneous premise. Contrary to petitioners' contentions, respondents never asserted that "post-1969 advertising and promotions should have included additional, or more clearly stated warnings," (Pet. at 21) or that "petitioners' marketing activities . . . undermined or 'neutralized' the federal warning labels." Pet. at 22. Why people smoke and why they started smoking were issues raised by petitioners in connection with consumer expectation and awareness defenses.[30]

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[29] For example, pre-July 1, 1969 tobacco advertisements were properly admitted under the viable pre-1969 failure to warn claims and post-July 1, 1969 advertisements were properly admitted that contained false information, pursuant to *Cipollone*, 505 U.S. at 524, 528-29.

[30] In addition to raising defenses that opened the door to limited testimony about smoking initiation, including youth marketing, *during*

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Petitioners state that there was "testimony concerning a presentation focusing on 65-70 different tobacco advertisements, including an ad for Camel cigarettes, Chesterfields, and Virginia Slims," referring to T.12879-82. Pet. at 6, n.1. But they are referring to *voir dire* examination, not testimony before the jury. Moreover, the "presentation" was *excluded* by the trial court. T.12894-95. Thomas L. Petty, M.D., a pulmonologist who collected old tobacco advertisements as a hobby, had a presentation of tobacco ads from the 1930s, 40s and 50s, years *before* the federally mandated warnings, that he made at medical schools. T.12867, 12875. He was permitted to only identify his old ads, without making his presentation or expressing any opinions regarding the tobacco advertisements, and identified approximately six ads, not 65-70. T.12945-49, 12951.

Petitioners also erroneously state: "Witnesses testified that petitioners failed to warn smokers that nicotine was addictive. T.12020-27; T.13479-80." Pet. at 21. The first reference (T.12020-27) is to a side-bar conference, outside the presence of the jury, during the testimony of Dr. Neal Benowitz, a nicotine specialist who *never* testified that petitioners failed to warn smokers that nicotine was addictive. Instead, it was counsel for petitioners who expressed his *belief* that a particular tobacco internal document offered into evidence during Benowitz' testimony was intended "to show that the defendants suppressed, concealed or otherwise should have warned about the contents of this document." T.12020. But the document was offered to demonstrate petitioners' *knowledge* of the addictiveness of nicotine in 1972, since petitioners denied

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Phase I Philip Morris conducted a $100 million national television advertising campaign with "T.V commercials . . directed at saying peer pressure is why kids smoke." T.17835; 16727; 16258. The class was powerless to stop the Philip Morris advertising campaign (T.17113; 17832-38), or Brown & Williamson Tobacco's website that was launched during Phase I and also addressed "marketing to youth and Brown & Williamson's youth responsibility program," as well as other *Engle* issues. R.46923-46996. Now petitioners argue that references to youth marketing are preempted. (Pet. at 23, n.9).

at trial that nicotine was addictive. T.12020-21. The class did not raise any failure to warn claims post-July 1, 1969. Nor did Dr. Michael Siegel testify that "petitioners failed to warn smokers that nicotine was addictive." T.13479-80. Pet. at 21. Dr. Siegel testified as to scientific information that was not shared with the *public health community*. His testimony did not address warnings. T.13480.[31]

Petitioners inaccurately assert that "one of respondents' experts testified that the use of 'healthy and vigorous' people in tobacco advertising minimized the impact of the warnings on smokers and potential smokers, including minors," citing T.17265; 11377-78; 17210. Pet. at 22. The transcript references are to the testimony of Dr. Jeffrey Arnett and former U.S. Surgeon General Julius Richmond, M.D. Dr. Arnett's testimony responded to "Why do young people smoke?" the question posed in petitioners' opening statements (T.10956, 11063), and refuted petitioners' assertions that advertising does not cause children or anyone to start smoking but rather only impacts smokers' decisions to switch brands. T.16227-29; 16233; 18465; 20301; 20933. Dr. Arnett testified that cigarette advertising influences non-smoking adolescent smoking initiation (T.17210, 17264-65), but he never testified about warnings or their impact on youth or anyone else. Nor did Dr. Richmond testify about warnings. Pet. at 22. He testified on redirect examination that certain advertisements influence smoking initiation by youth, a subject introduced by petitioners through cross examination about whether peer pressure results in the initiation of smoking. T.11376-78.

Petitioners erroneously assert that class counsel "expressly invited the jury to disregard the law." Pet. at 6. But the Florida Supreme Court found otherwise: "These arguments were *not* an attempt to tell the jury to ignore

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[31] Several of petitioners' references are to arguments of counsel outside the presence of the jury, not evidence (T.10480, 16871-81; Pet. at 23), or to argument of counsel where no objections were raised. (T.16900; Pet. at 23), (T.36371; Pet. at 26), (T.40247-51; Pet. at 22), (T.36436; Pet. at 23). In all instances, the evidence challenged by petitioners was admissible on non-preempted grounds.

the law." (Emphasis supplied). App. 39a. "Context is crucial." App. 35a. The petitioners describe the trial court judge as acting in a contemptuous fashion with "manifest disregard . . . for federal preemption." Pet. at 8, 29. Petitioners fail to disclose that in each referenced instance where Judge Kaye expressed disagreement and frustration with preemption, *he nevertheless ruled in favor of the petitioners*, sustaining objections and instructing the jury to disregard the evidence or testimony (T.16626-27; 27879). Petitioners state: "When petitioners objected, the court expressed contempt for the very idea of federal preemption, saying that it '[b]oils my blood and boggles my mind,'" referring to T.16621-22. Pet. at 8. What actually happened is that Judge Kaye commented, outside the presence of the jury, that the application of preemption prevented important advances in science from being shared with the public, and then defense counsel, Richard Kirby said: "It boils your blood, I can tell." To which Judge Kaye responded: "Boils my blood and boggles my mind." Mr. Kirby responded: "I know it does and I appreciate your personal feeling about it." T.16622. Although the trial judge was frustrated by petitioners' platitude: "That's what preemption does," he nevertheless repeatedly sustained petitioners' objections on preemption and granted their requests for curative instructions. T.27878-79; 27886. Thus, the petitioners have offered a misleading presentation of the colloquy and ignore the fact that Judge Kaye adhered to preemption principles and *Cipollone*, even when he believed they were contrary to public health interests.[32]

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[32] *Compare Cipollone*, 505 U.S. at 544, Blackmun, J., Kennedy and Souter, J.J., concurring in part and dissenting in part: "By finding federal preemption of certain state common-law damages claims, the decision today eliminates a critical component of the States' traditional ability to protect the health and safety of their citizens."

D. There Is No Conflict Warranting A Reexamination Of *Cipollone*

Petitioners suggest that there is a conflict among courts that requires this Court's attention and its reexamination of *Cipollone*. There is no conflict where petitioners concede that the Florida Supreme Court's "fleeting reference to preemption" (Pet. at 10, n.4), "fail[ed] to address the preemption issue." Pet. at 29. The requisite "real or intolerable conflict on the same matter of law or fact," ROBERT L. STERN ET AL., SUPREME COURT PRACTICE at p.225 (8th ed. 2002) is not present. Petitioners assert: "This Court's review is needed to resolve the conflict as to whether characterizing failure-to-warn and neutralization claims as fraudulent conduct claims defeats preemption." Pet. at 24. But the Florida courts, below, did *not* render any preemption decisions based on how a claim was labeled. For example, addressing an objection to evidence class counsel described as "false advertising [where] ... there's no preemption," (T.2786), the trial court found that under *Cipollone* "it leans more toward neutralization," and sustained the objection. T.27877-79. The order granting petitioners' motion for partial summary judgment on preemption determined that allegations contained within claims for fraud, conspiracy, negligence and strict liability, were preempted. R.12960-63; 12974-13066. Nor was the labeling of a claim dispositive in determining preemption issues in any of the post-*Cipollone* cases cited in the petition and Appendix G.[33]

Farnan and Della Vecchia started smoking and were addicted to cigarettes prior to July 1, 1969 and are subject to essentially *no* preemption defenses as to their claims that

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[33] Petitioners have expanded their petition with an eight page single-spaced "Appendix G" containing a list of 45 post-*Cipollone* smokers' decisions, captioned: *Post-Cipollone Decisions Addressing Preemption of "Concealment" and "Neutralization" Claims*, with a description of each case prepared by petitioners. App. 207a-214a. "Counsel should of course be sensitive not to include material [in the appendix] that may be perceived as an attempt to avoid the court's page limits." STERN *supra* at 609.

arose *before* the 1969 law went into effect (e.g. pre-1969 failure to warn claims), and on those pre-1969 claims, alone, their judgments must be affirmed. Thus, as to the jury findings of pre-1969 negligence (App. 200a-204a; T.50385-86) nothing the Court can determine with respect to the preemption issue can affect Farnan and Della Vecchia's judgments, rendering this matter particularly uncertworthy and an inappropriate vehicle for asserting conflict. In contrast to other class members whose cases have not been adjudicated, the final judgments of Farnan and Della Vecchia are also supported by the fraud and conspiracy findings in Phases I and II-A that the jury found were a legal cause of damage or death to the two class representatives. The Florida Supreme Court's determination that the Phase I fraud and conspiracy counts are not to be given preclusive effect in future claims of putative class members, has no impact on the class representatives' final judgments that were reinstated by the court. The fraud and conspiracy counts provide additional non-preempted claims in support of the two verdicts and judgments. *See Cipollone*, 505 U.S. at 530-31 and n.28.

Petitioners argue that because of the "massive" number (700,000) of Florida's victims (Pet. at 1, 2, 5), and the magnitude of petitioners' "wrongdoing [and] misconduct occurring over more than five decades," (Pet. at 5), "immediate review is both necessary and efficient [to save petitioners from] . . . years of delay and expense." Pet. at 19. After litigating for over thirteen years, petitioners know that the longer they are able to delay these proceedings, the fewer lawsuits petitioners will ultimately face due to the tragically high attrition rate of sick smokers, particularly with a class cut-off date of over one-decade ago, of November 21, 1996. App. 41a. Petitioners' alternative request for a "GVR" (Pet. at 30), is unwarranted and would serve no purpose other than to further protract the litigation where absent class members have waited more than thirteen years for relief.[34]

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[34] A GVR was never intended to grant petitioners a second appeal on preemption, an issue they did not adequately raise and preserve

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After thirteen years of protracted litigation, with over a dozen appellate proceedings in state and federal courts, a two-year trial that was subject to full appellate review, in which petitioners largely prevailed on appeal, and where legal notice has been disseminated by publication throughout Florida in 1997 and 2007, "*enough is enough.*"[35]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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before the state supreme court under federal and Florida law. *Beck*, 369 U.S. at 553; *Duest*, 555 So.2d at 852; *Sag Harbour*, 484 So.2d at 1256. Nor is a GVR appropriate where preemption was addressed by the district court and also addressed in a sentence by the Florida Supreme Court, commensurate with petitioners' fleeting reference to that issue in one sentence on page forty-nine of a fifty-page brief. And a GVR makes no sense at all in a case where there are specific pre-July 1, 1969 jury findings of negligence supporting the two judgments so that any consideration of preemption could not change the ultimate outcome. The cases cited by petitioners are inapposite. *See Lawrence v. Chater*, 516 U.S. 163, 174-75 (1996) (GVR would give Court of Appeals opportunity to consider "new interpretation of the Social Security Act"); *Youngblood v. West Virginia*, 126 S.Ct. 2188, 2190 (2006) ("Youngblood *clearly presented* a federal constitutional Brady claim to the State Supreme Court [and] . . . the dissenting Justices discerned the significance of the issue raised") (emphasis supplied).

[35] *Federal Election Com'n v. Wisconsin Right To Life, Inc.*, 127 S.Ct. 652, 2672 (2007).

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In the Supreme Court of the United States

R.J. REYNOLDS TOBACCO CO., *et al.*,

Petitioners,

v.

HOWARD A. ENGLE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

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REPLY BRIEF FOR PETITIONERS

The brief in opposition is remarkable for its near-total failure to defend the decision below or to deny its immense practical impact. Instead, respondents struggle to obscure the issues presented for review by manufacturing claims of waiver and seriously distorting the record. These diversionary tactics cannot change the essential facts: petitioners fully preserved their due process and preemption arguments; the Florida Supreme Court's preclusion ruling is a final judgment that has such significant consequences and is so manifestly wrong that it merits immediate review; and the preemption issue is important, the subject of considerable lower-court confusion, and readily resolved without wading into the factual record. Certiorari is warranted.

1. Due Process. In contending that the Court should indefinitely defer consideration of petitioners' due process claim, respondents make three unpersuasive arguments. First, they suggest that the Court lacks jurisdiction to review the Florida Supreme Court's ruling that the Phase I findings be given preclusive effect because that directive was only a "statement" in the opinion and not a part of the actual "judgment." BIO 12. This argument is flatly inconsistent with respondents' own prior pronouncements. On rehearing in the Florida Supreme Court, respondents proclaimed that the court's "Final Judgment addresses and incorporates the Phase I findings"; that those findings "have all the indicia of finality for purposes of appellate review"; and that the findings "constitute an *integral and necessary part of the verdicts and final judgment in favor of the Class Representatives*." Petitioners' Florida Engle Class Response to Respondents' Motions for Rehearing at 17 (emphasis added).

Respondents' about-face also exhibits a profound misunderstanding of what constitutes a "judgment" reviewable under § 1257. A "judgment" is a "court's final determination of the rights and obligations of the parties in a case." BLACK'S LAW DICTIONARY (8th ed. 2004). That definition

applies to the Florida Supreme Court's declaration that the Phase I findings are to be "given res judicata effect in any subsequent trial between individual class members and the defendants." Pet. App. 44a-45a.[1] Respondents try to avoid this conclusion by suggesting (BIO 12) that there can be no judgment for a party unless a court also awards damages or injunctive relief. That is plainly wrong. This Court has long recognized that it "is not necessary, in order to constitute a judicial judgment, that there should be both a determination of the rights of the litigants and also power to issue formal execution to carry the judgment into effect." *Old Colony Trust Co.* v. *Comm'r of Internal Revenue*, 279 U.S. 716, 725 (1929); see also *Fidelity Nat'l Bank & Trust Co.* v. *Swope*, 274 U.S. 123, 132 (1927). There is no question, for instance, that declaratory judgments are subject to review as soon as they issue. See *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U.S. 249 (1933). So long as there is a "real, not a hypothetical controversy, which is finally determined by the judgment below," this Court can review a state court's declaratory ruling without issuing an advisory opinion. *Id.* at 264.

That is the situation here. The preclusion ruling is a "definitive determination of the legal rights of the parties" (*Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 241 (1937)), made in the midst of a controversy that is anything but "hypothetical." Former class members are already filing new suits against petitioners, in which they assert that the Florida Supreme Court's decision has eliminated their customary burden of proof. Pet. 18 n.8.[2] Under these circumstances, a

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[1] Indeed, respondents themselves have gone so far as to say that the court's decision "finally determined the rights of all parties with respect to the Engle class action litigation." Florida Engle Class Response To All Appellants' Motions Regarding Proceeding on Remand at 2.

[2] Since the filing of the BIO, complaints have been filed on behalf of approximately 600 former class members. Like those discussed in the petition (at 18 n.8), these complaints assert that the preclusion ruling establishes *all* elements of plaintiffs' claims except for causation and damages.

decision by this Court would "directly affect[]" petitioners' "valuable legal rights" that are "threatened with imminent invasion." *Wallace*, 288 U.S. at 262. The fact that petitioners may assert due process objections in subsequent cases does nothing to change the situation. Just last Term, the Court held that a decision can be a "judgment" (and thus reviewable) even though it provides an "advanced ruling[] on matters that would be addressed in a future case." *MedImmune, Inc.* v. *Genentech, Inc.*, 127 S. Ct. 764, 771 n.7 (2007).

Second, respondents suggest that the Court should wait for the preclusion ruling to be applied in the follow-on cases. BIO 10-11. Such delay is both unnecessary and imprudent. To begin with, there is no way to give preclusive effect to general Phase I findings in individual cases without violating due process.[3] Although individual class members' legal and factual claims may differ, the due process problem with applying preclusion is identical and insurmountable. That issue thus is ripe for decision now and will not be made easier by being embedded in any particular follow-on case. Cf. *Whitman* v. *American Trucking Assn's*, 531 U.S. 457, 479 (2001). Under these circumstances, there is no practical reason to

[3] Respondents' efforts to defend the merits of the preclusion ruling are anemic. First, petitioners' claim is not a "disguised Seventh Amendment re-examination argument." BIO 10 n.10. Indeed, this Court has expressly found that the Due Process Clause forbids giving preclusive effect to verdicts that, like the ones below, rest inconclusively on any of several grounds. Pet. 13-14. Similarly, it is irrelevant that petitioners may "have fully defended through trial and appeal." BIO 13. In *Fayerweather* v. *Ritch*, 195 U.S. 276 (1904), and all the other cases recognizing similar limitations on the use of preclusion, a party's participation in the trial has never been sufficient to give preclusive effect to an ambiguous verdict. Finally, although courts have allowed preclusion where the facts found in the first case *could* be determined by examining the record (BIO 13 n.13, 15 n.17), that only highlights the problem in this case. Here, *neither* the Phase I verdicts *nor* the record provides any way of determining which of respondents' alternative factual claims the jury actually accepted.

wait to undo the serious harm that the Florida Supreme Court's ruling produces.[4]

To the contrary, there are compelling reasons *not* to wait, as any delay would be highly inefficient and unfair. The decision below confronts petitioners with an immediate and tangible hardship: the specter of an untold number of suits across Florida, all of which petitioners will be forced to defend with one hand unconstitutionally tied behind their backs. Moreover, the very existence of the ruling below serves as a catalyst for such litigation, causing former class members to believe that they can recover from petitioners without having to prove most of their case. Plaintiffs' lawyers have estimated that no fewer than 35,000 individual cases will be filed before the one-year filing period ends next January. See Memorandum in Support of Motion for Remand at 11, *Caprio* v. *R.J. Reynolds Tobacco Co.*, No. 07-20712 (S.D. Fla. Apr. 6, 2007). These cases all will be premised on the same unconstitutional judgment. Waiting to correct that obvious defect until such litigation runs its course thus would impose a considerable and needless burden, not just on petitioners but also on the state and federal judicial systems in Florida.[5] Prudent exercise of this Court's review power calls for considering, not disregarding, this reality.

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[4] Respondents' reliance on Justice Stevens' opinion concurring in the dismissal of *Nike, Inc.* v. *Kasky*, 539 U.S. 654 (2003), thus is misplaced. *Nike* involved a "difficult" and "novel[]" constitutional question, the "correct answer" to which required the study of a "full factual record." *Id.* at 663-64. The question raised here, in contrast, is straightforward and readily resolved now. This case is analogous to *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494, 500 (1931), in which the Court held that the limited retrial ordered by the lower court, but that *had not yet taken place*, "would amount to a denial of a fair trial." Just as the Court in *Gasoline Products* did not wait for the deficient proceeding to occur before interceding, it need not and should not wait here.

[5] To the extent the litigation is successful because of this due process violation, it would expose petitioners to the kind of "potential liability" that

Third, respondents assert that petitioners did not preserve their objections to the generalized Phase I jury findings. BIO 13-17. This claim is based on significant distortions of the record, which clearly shows that petitioners objected to the verdict form at every opportunity.[6] In Phase I, after both sides had submitted proposed verdict forms, petitioners argued that unless the verdicts identified the precise content of the jury's findings, they would be "useless for application to individual plaintiffs in this case." App. C, *infra*, 30a, 34a, 35a-36a, 37a, 43a.[7] When the court promulgated a verdict form that failed to require findings specific enough to clarify precisely what the jury found, petitioners made the same objection. R.49493-49532. Petitioners also opposed a secondary proposal made by respondents (Apps. D & E, *infra*) that was *even worse*. But that hardly means that petitioners "preferred" the final form (BIO 17) – a claim flatly contradicted by the record. Indeed, the very transcript on which respondents rely makes plain that petitioners never abandoned their basic objections to the verdict form or their insistence on greater specificity. App. A, *infra*, 109a-110a. There was nothing remotely resembling a waiver here.[8]

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is "a strong factor in deciding whether to grant certiorari." *Fidelity Fed. Bank & Trust v. Kehoe*, 547 U.S. 1051 (2006).

[6] To aid review, we have appended record material that illustrates some of respondents' most significant distortions. App. F, *infra*.

[7] See also App. F, *infra*, 102a (petitioners' argument that if "you merely ask this jury whether the defendants made a misstatement of a material fact, and they are not required to identify what it is, when you go into the Phase II and Phase III trials of the individual smokers' claims, that finding will have no meaning"); *Id.* at 101a (same argument as to design defect findings); *Id.* at 102a ("I can't figure out what we do with a finding that some defendant at some time made some misstatement of fact.").

[8] On appeal, petitioners renewed their objections, arguing that giving effect to the Phase I findings in the trials of individual plaintiffs would violate due process. App. K, *infra*. Although respondents asserted the same waiver arguments made here (App. I, *infra*), no state court ever so much as *hinted* that the due process challenge had been waived, and the Florida

Nor are respondents helped by arguing that a party who objects to a generalized verdict form must "propose and offer a form with the requisite findings." BIO 16 n.21. Petitioners *did* offer such an alternative, which would have called for the jury to enumerate the specific factual bases for its findings. Apps. B & C, *infra*. As respondents observe (BIO 15-16 & n.18), "blank-line" verdict forms often may not be necessary to provide adequate specificity, but that does not mean that such a form, or some other effective means of specifying the jury's findings, was not a necessary predicate to preclusion *in this case*, given the wide diversity of claims and evidence presented in Phase I. The special nature of Phase I demanded, at a minimum, a verdict form that was up to the challenge. The one used here simply was not.[9] And whatever "broad discretion" judges have to fashion verdict forms (BIO 16), ambiguous verdicts still may not be given preclusive effect where due process forbids it. That respondents and the Florida courts chose to disregard petitioners' repeated invocation of that bedrock rule does not indicate waiver, but is instead the very reason certiorari is warranted.

2. Preemption. Respondents do not defend the Florida courts' refusal to enforce preemption, but instead fabricate a series of procedural obstacles that cannot withstand scrutiny.

To begin, respondents contend that petitioners failed to preserve the preemption argument in the Florida courts. BIO 18-21. This contention is belied by the record and misstates Florida's settled appellate procedure. Petitioners raised preemption objections throughout the trial (*e.g.*, T.16400-01,

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Supreme Court in fact proceeded to invalidate certain of the Phase I findings. Pet. App. 3a.

[9] Respondents thus miss the point in assigning significance to the fact that the trial court used a "special interrogatory verdict form." BIO 13 & n.14. It is irrelevant whether the jury returned a "general" or "special" verdict. What matters is whether the verdict allows courts to identify which of respondents' alternative factual claims the jury accepted. The Phase I verdict does not -- and respondents do not even pretend otherwise.

18708-19, 27957-58, 42383-84) and in post-trial motions, which the trial court ultimately rejected. Pet. App. 138a-139a. Petitioners then argued preemption at length to the Court of Appeal. App. J, *infra*. That court did not decide the issue because it gave complete relief to petitioners on other grounds. This set the stage for *respondents'* Florida Supreme Court appeal. That court's stated general practice is to avoid addressing alternative grounds for affirmance left undecided by the intermediate appellate court, and, upon a reversal, to remand so that the latter court can address those alternatives first.[10] The Florida Supreme Court *never* has endorsed the inefficient and senseless rule that an appellee must, on pain of waiver, brief in detail every alternative basis for affirmance that was presented but not reached below.[11] In keeping with the court's practice, and in an abundance of caution, petitioners informed the Florida Supreme Court that they had raised additional points of error (including preemption) in the Court of Appeal. Petitioners observed that those points "provide additional, alternative grounds" for affirmance "or would require further proceedings upon remand." App. K, *infra*. This reminder was sufficient to apprise the court "of the nature or substance" of the preemption argument "at the time and in the manner required by the state law." *Webb* v. *Webb*, 451 U.S. 493, 501 (1981).

Moreover, petitioners continued to press the preemption issue after the Florida Supreme Court ruled, seemingly with-

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[10] *E.g.*, *Rosen* v. *Fla. Ins. Guar. Ass'n*, 802 So. 2d 291, 295 n.6, 298 (Fla. 2001); *Provident Mgmt. Corp.* v. *City of Treasure Island*, 718 So. 2d 738, 740 (Fla. 1998); *Florida* v. *Norstrom*, 613 So. 2d 437, 441 (Fla. 1993).

[11] The cases cited by respondents (BIO 19 & n.25) are entirely different. All involve an *appellant's* failure adequately to present arguments for *reversal*. Similarly, in *Beck* v. *Washington*, 369 U.S. 541, 552-53 (1962), the petitioner omitted the waived argument *both* in the "assignments of error" required by state law *and* in his petition for rehearing.

out deciding preemption.[12] On rehearing, petitioners asked the Supreme Court to "clarify" that the Court of Appeal should decide that issue or, alternatively, to "state" that it had already "considered and rejected defendants' arguments." App. M, *infra*. The court did neither. And petitioners' subsequent request to the Court of Appeal to address preemption was denied without comment. App. N, *infra*. Under these circumstances, there is no doubt that the state courts "have been afforded a fair opportunity to address the federal question that is sought to be presented here." *Webb*, 451 U.S. at 501; see also *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928). Indeed, no Florida court has ever *suggested* that petitioners waived or otherwise failed adequately to present their preemption argument.

Next, respondents assert that addressing preemption would require wading through a voluminous evidentiary record. That is not so. The Florida courts' failure to protect petitioners against preempted claims can be identified and corrected by this Court without any "factual determinations on disputed points." BIO 24. Two aspects of the proceedings are dispositive in this respect. The first is the trial court's fatally flawed jury instructions. During Phase I, the jury was told that "federal law does not limit the liability of any defendant against claims based on," *inter alia*, "negligence," "fraud," and "misrepresentation." T.37569-70. This instruction was patently wrong. Pet. 26-28. Compounding that error, the trial court refused petitioners' request in Phase I to instruct the jury that claims based on a neutralization theory are preempted and that failure to warn and neutralization claims are

[12] In a remarkable example of trying to have it both ways, respondents assert (BIO 19 n.24) that the Florida Supreme Court *did* decide the preemption question when it stated that compliance with the federal warnings "did not eliminate" any Phase I cause of action other than failure to warn (Pet. App. 38a). To the extent respondents are right, that is "sufficient" to bring the preemption issue before this Court, regardless of whether it was properly presented below. *Jenkins* v. *Georgia*, 418 U.S. 153, 157 (1974).

preempted even if packaged as "concealment" claims. Pet. App. 190a-191a.[13] These basic instructional errors allow the Court to decide the preemption issue simply by interpreting the Labeling Act without having to make factual determinations or perform a detailed examination of the record.[14]

That the failure to give a proper preemption instruction affected the judgments is confirmed by the Phase I findings. The most obvious example is the concealment finding, which shows that the jury accepted claims predicated on the theory that petitioners failed to disclose information about the health effects or addictive nature of cigarettes. Pet. App. 197a. These were classic failure-to-warn claims and unquestionably would have been preempted had they been identified as such. Pet. 21-22. Respondents tried to avoid that result by presenting their claims as targeting "fraudulent" conduct. Having rejected the instruction proposed by petitioners to prevent that evasion, the trial court went on to endorse respondents' maneuver as a matter of law. Pet. App. 139a. Not only did the Florida Supreme Court fail to correct this error, respondents themselves read the court's decision as *accepting* the trial court's flawed reasoning. *Id.* at 38a. Thus, contrary to re-

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[13] As even a cursory examination of the language quoted by respondents reveals, it is simply incorrect to assert that petitioners' proposed instruction suggested that "all claims against tobacco companies are barred after July 1, 1969." BIO 21. Moreover, respondents' observation that the *Phase II-A* instruction mentioned neutralization is beside the point, given that (1) the Phase I instruction ignored neutralization (thus contaminating both the Phase I findings and the individual judgments, which the jury in Phase II-A was expressly instructed to base on the Phase I findings (see T.50235-243; App. H, *infra*)); and (2) both instructions incorrectly told the jury that preemption did not apply to certain categories of claims.

[14] In this respect, this case closely resembles *Philip Morris USA* v. *Williams*, 127 S. Ct. 1057 (2007), in which this Court relied on the failure to give a proposed jury instruction in order to reverse without having to comb through the factual record.

spondents' contention (BIO 28), preemption clearly has been sidestepped here through the manipulation of labels.[15]

As a result, this case squarely raises the post-*Cipollone* division as to whether preemption can be circumvented by labeling otherwise preempted claims as "fraud" or "concealment" claims. Respondents do not even attempt to dispute that the courts are hopelessly confused on that question or to minimize its practical significance. Cf. PLAC *Amicus* Br. 9-17; Professors' *Amicus* Br. 2-5. Now that respondents Farnan and Della Vecchia have renounced any claim to punitive damages (see BIO 2 n.3), there is no conceivable jurisdictional obstacle to deciding the issue here (or to using the GVR procedure), and doing so would have a significant impact not only on this case and all follow-on cases, but on smoking and health litigation generally. Denial of review, in contrast, will only prolong the confusion and clog the courts with new claims that Congress intended to preclude.

The petition for a writ of certiorari should be granted.

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[15] These preemption errors infect the Phase I findings and thus contaminate the claims of *all* class members, not just Farnan's and Della Vecchia's individual judgments. Nevertheless, respondents argue – again relying on labels – that a ruling in petitioners' favor on preemption would not affect those individual judgments because they rest in part on misrepresentation claims that are not preempted. BIO 29. But the fraud claim made by those plaintiffs was based in large part on assertions that petitioners neutralized the federally mandated warning labels, for example by marketing certain brands as "lights" and by using so-called glamour advertising. App. G, *infra*. As courts have recognized, "fraud" claims based on such neutralization theories *are* preempted. *E.g.*, *Brown* v. *Brown & Williamson Tobacco Corp.*, 479 F.3d 383, 391-93 (5th Cir. 2007).

Finally, respondents argue that this Court's review of preemption cannot affect the individual judgments because those judgments are supported by findings of pre-July 1, 1969, breach of implied warranty and negligence. BIO 20-21 & n.26. In fact, however, there are no such findings. Although Phase I included findings of pre- and post-July 1, 1969, breach of implied warranty and negligence, in Phase II-A, respondents sought and obtained a verdict form that prevented the jury from indicating the timing of the injurious conduct. App. I, *infra*, at 137a-140a.

Respectfully submitted.

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APPENDIX A

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 94-08273 CA (22)

HOWARD A. ENGLE, M.D., ROBERT W. ANGELL, RAYMOND LACEY, FROSENE D. STEEVENS, FRANK AMODEO, MARY FARNAN, LOREN E. LOWERY, ANGIE DELLA VECCHIA and MICHAEL MATYI, on behalf of themselves and all others similarly situated,

FLA. BAR NOS.: 068445
142163

Plaintiffs,

v.

DRAFT-1

RJ REYNOLDS TOBACCO COMPANY, RJR NABISCO, INC., PHILIP MORRIS INCORPORATED ("PHILIP MORRIS U.S.A."), PHILIP MORRIS COMPANIES, INC., LORILLARD TOBACCO COMPANY, LORILLARD, INC., THE AMERICAN TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORP., LIGGETT GROUP, INC., BROOKE GROUP, LTD., INC., COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC. and TOBACCO INSTITUTE, INC.,

Defendants.

_____/

FLORIDA CLASS PROPOSED VERDICT FORM FOR PHASE I

We, the Jury, return the following Verdict:

[Generic Causation]

1. Does smoking cigarettes cause one or more of the following diseases or medical conditions, in some smokers and former smokers?

Lung cancer Yes _____ No _____

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Emphysema	Yes ____	No ____
Chronic obstructive pulmonary disease [including lung disease, chronic bronchitis and diminished lung capacity]	Yes ____	No ____
Cancer of the larynx/voice box [head and neck cancer]	Yes ____	No ____
Cancer of the oral cavity/tongue [cancer of the mouth]	Yes ____	No ____
Heart disease [including cardiovascular disease, coronary heart disease, hardening of the arteries, atherosclerosis, coronary artery disease and arteriosclerosis, angina, abnormal blood clotting, blood vessel damage, heart attack, myocardial infarction]	Yes ____	No ____
Complications in pregnancy [including miscarriage]	Yes ____	No ____
Esophageal cancer	Yes ____	No ____
Bladder cancer [urinary bladder]	Yes ____	No ____
Pancreatic cancer	Yes ____	No ____
Kidney cancer [renal cancer]	Yes ____	No ____
Throat cancer	Yes ____	No ____
Stomach cancer	Yes ____	No ____
Pharyngeal cancer	Yes ____	No ____
Cervical cancer	Yes ____	No ____
Buerger's disease [including circulation problems and peripheral vascular disease]	Yes ____	No ____
Aortic aneurysm	Yes ____	No ____
Stroke [cerebrovascular disease, brain damage]	Yes ____	No ____

Asthma conditions related to chronic obstructive pulmonary disease	Yes _____	No _____
Infertility	Yes _____	No _____
Pulmonary disease	Yes _____	No _____

If your answer to all of the diseases, above, is "no", your verdict is for the Defendants, and you should not proceed further except to date and sign this verdict form. If you answered "yes" to one or more of the above diseases or medical conditions, please answer all of the remaining questions on this verdict form.

[Addiction/Dependence]

2. Are cigarettes that contain nicotine addictive or dependence producing in some smokers?

Yes _____ No _____

[Strict Liability]

3 Did one or more of the Defendant Tobacco Companies place cigarettes on the market that were defective/unreasonably dangerous and a legal cause of loss, injury or damage to some smokers?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	Yes _____	No _____
RJ Reynolds Tobacco Company	Yes _____	No _____
Brown & Williamson Tobacco Corporation	Yes _____	No _____
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes _____	No _____
Lorillard Tobacco Company/Lorillard, Inc.	Yes _____	No _____
Liggett Group, Inc./Brooke Group, Ltd., Inc.	Yes _____	No _____

[*Fraud and Misrepresentation*]

4. Did one or more of the Defendants make a false statement concerning a material fact, or conceal a material fact, either knowing the statement was false or misleading, or being without knowledge as to its truth or falsity, with the intention of misleading smokers and members of the public?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	Yes _____	No _____
RJ Reynolds Tobacco Company	Yes _____	No _____
Brown & Williamson Tobacco Corporation	Yes _____	No _____
Brown & Williamson Tobacco Corporation as successor to American Tobacco Company	Yes _____	No _____
Lorillard Tobacco Company/Lorillard, Inc.	Yes _____	No _____
Liggett Group, Inc./Brooke Group, Ltd., Inc.	Yes _____	No _____
Council for Tobacco Research-U.S.A.	Yes _____	No _____
Tobacco Institute	Yes _____	No _____

[Civil Conspiracy]

5. Did two or more of the Tobacco Companies enter into an agreement to conceal, suppress or misrepresent information regarding the health effects of cigarette smoking, or the addictiveness of smoking, with the intention that smokers and members of the public rely to their detriment?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	Yes _____	No _____
RJ Reynolds Tobacco Company	Yes _____	No _____
Brown & Williamson Tobacco Corporation	Yes _____	No _____
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes _____	No _____

Lorillard Tobacco Company/Lorillard, Inc.	Yes _____	No _____
Liggett Group, Inc./Brooke Group, Ltd., Inc.	Yes _____	No _____
Council for Tobacco Research-U.S.A.	Yes _____	No _____
Tobacco Institute	Yes _____	No _____

[Negligence]

6. Are one or more of the Defendants negligent and was said negligence a legal cause of damage, injury or death to some smokers?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	Yes _____	No _____
RJ Reynolds Tobacco Company	Yes _____	No _____
Brown & Williamson Tobacco Corporation	Yes _____	No _____
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes _____	No _____
Lorillard Tobacco Company/Lorillard, Inc.	Yes _____	No _____
Liggett Group, Inc./Brooke Group, Ltd., Inc.	Yes _____	No _____

[Intentional Infliction of Emotional Distress]

7. Did one or more of the Defendants engage in extreme and outrageous conduct with the intent to cause severe emotional distress or with reckless disregard of the high probability of causing severe emotional distress to some smokers?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	Yes _____	No _____
RJ Reynolds Tobacco Company	Yes _____	No _____
Brown & Williamson Tobacco Corporation	Yes _____	No _____

Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes _____	No _____
Lorillard Tobacco Company/Lorillard, Inc.	Yes _____	No _____
Liggett Group, Inc./Brooke Group, Ltd., Inc.	Yes _____	No _____
Council for Tobacco Research-U.S.A.	Yes _____	No _____
Tobacco Institute	Yes _____	No _____

[Breach of Express Warranty]

8. Did one or more of the Defendant Tobacco Companies sell or supply cigarettes that did not conform to representations of fact made by said Defendant(s), either orally or in writing, on which some smokers, relied to their detriment?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	Yes _____	No _____
RJ Reynolds Tobacco Company	Yes _____	No _____
Brown & Williamson Tobacco Corporation	Yes _____	No _____
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes _____	No _____
Lorillard Tobacco Company/Lorillard, Inc.	Yes _____	No _____
Liggett Group, Inc./Brooke Group, Ltd., Inc.	Yes _____	No _____

[Breach of Implied Warranty]

9. Did one or more of the Defendant Tobacco Companies sell or supply cigarettes that were defective in that they were not reasonably fit for the uses intended, causing loss, injury or damage to some smokers?

Please answer "Yes" or "No" as to each of the Defendants, below:

Philip Morris, Incorporated	Yes _____	No _____

RJ Reynolds Tobacco Company	Yes _____	No _____
Brown & Williamson Tobacco Corporation	Yes _____	No _____
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes _____	No _____
Lorillard Tobacco Company/Lorillard, Inc.	Yes _____	No _____
Liggett Group, Inc./Brooke Group, Ltd., Inc.	Yes _____	No _____

[Entitlement to Punitive Damages]

10. Under the circumstances of this case, state below whether punitive damages are warranted against:

Philip Morris, Incorporated	Yes _____	No _____
RJ Reynolds Tobacco Company	Yes _____	No _____
Brown & Williamson Tobacco Corporation	Yes _____	No _____
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes _____	No _____
Lorillard Tobacco Company/Lorillard, Inc.	Yes _____	No _____
Liggett Group, Inc./Brooke Group, Ltd., Inc.	Yes _____	No _____
Council for Tobacco Research-U.S.A.	Yes _____	No _____
Tobacco Institute	Yes _____	No _____

SO SAY WE ALL, this ___ day of _____, 1999.

_____
FOREPERSON

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 94-08273 CA (22)

HOWARD A. ENGLE, M.D., ROBERT W. ANGELL, RAYMOND LACEY, FROSENE D. STEEVENS, FRANK AMODEO, MARY FARNAN, LOREN E. LOWERY, ANGIE DELLA VECCHIA and MICHAEL MATYI, on behalf of themselves and all others similarly situated,

FLA. BAR NOS.: 068445
142163

Plaintiffs,

DRAFT-2

v.

RJ REYNOLDS TOBACCO COMPANY, RJR NABISCO, INC., PHILIP MORRIS INCORPORATED ("PHILIP MORRIS U.S.A."), PHILIP MORRIS COMPANIES, INC., LORILLARD TOBACCO COMPANY, LORILLARD, INC., THE AMERICAN TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORP., LIGGETT GROUP, INC., BROOKE GROUP, LTD., INC., COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC. and TOBACCO INSTITUTE, INC.,

Defendants.

_____/

FLORIDA CLASS PROPOSED VERDICT FORM FOR PHASE I

We, the Jury, return the following Verdict:

[Generic Causation]

1. Does smoking cigarettes cause one or more of the following diseases or medical conditions, in some smokers and former smokers?

Lung cancer Yes _____ No _____

Emphysema	Yes _____	No _____
Chronic obstructive pulmonary disease	Yes _____	No _____
Cancer of the larynx/voice box	Yes _____	No _____
Cancer of the oral cavity/tongue	Yes _____	No _____
Heart disease	Yes _____	No _____
Complications in pregnancy	Yes _____	No _____
Esophageal cancer	Yes _____	No _____
Bladder cancer	Yes _____	No _____
Pancreatic cancer	Yes _____	No _____
Kidney cancer	Yes _____	No _____
Throat cancer	Yes _____	No _____
Stomach cancer	Yes _____	No _____
Pharyngeal cancer	Yes _____	No _____
Cervical cancer	Yes _____	No _____
Buerger's disease	Yes _____	No _____
Aortic aneurysm	Yes _____	No _____
Stroke	Yes _____	No _____
Asthma	Yes _____	No _____
Infertility	Yes _____	No _____
Pulmonary disease	Yes _____	No _____

If your answer to all of the diseases, above, is "no", your verdict is for the Defendants, and you should not proceed further except to date and sign this verdict form. If you answered "yes" to one or more of the above diseases or medical conditions, please answer all of the remaining questions on this verdict form.

[Addiction/Dependence]

2. Are cigarettes that contain nicotine addictive or dependence producing in some smokers?

Yes _____ No _____

[Strict Liability]

3. Did one or more of the Defendant Tobacco Companies place cigarettes on the market that were defective/unreasonably dangerous and a legal cause of loss, injury or damage to some smokers?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	Yes _____	No _____
RJ Reynolds Tobacco Company	Yes _____	No _____
Brown & Williamson Tobacco Corporation	Yes _____	No _____
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes _____	No _____
Lorillard Tobacco Company/Lorillard, Inc.	Yes _____	No _____
Liggett Group, Inc./Brooke Group, Ltd., Inc.	Yes _____	No _____

[*Fraud and Misrepresentation*]

4. Did one or more of the Defendants make a false statement concerning a material fact, or conceal a material fact, either knowing the statement was false or misleading, or being without knowledge as to its truth or falsity, with the intention of misleading smokers and members of the public?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	Yes _____	No _____
RJ Reynolds Tobacco Company	Yes _____	No _____

Brown & Williamson Tobacco Corporation	Yes _____	No _____
Brown & Williamson Tobacco Corporation as successor to American Tobacco Company	Yes _____	No _____
Lorillard Tobacco Company/Lorillard, Inc.	Yes _____	No _____
Liggett Group, Inc./Brooke Group, Ltd., Inc.	Yes _____	No _____
Council for Tobacco Research-U.S.A.	Yes _____	No _____
Tobacco Institute	Yes _____	No _____

[Civil Conspiracy]

5. Did two or more of the Tobacco Companies enter into an agreement to conceal, suppress or misrepresent information regarding the health effects of cigarette smoking, or the addictiveness of smoking, with the intention that smokers and members of the public rely to their detriment?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	Yes _____	No _____
RJ Reynolds Tobacco Company	Yes _____	No _____
Brown & Williamson Tobacco Corporation	Yes _____	No _____
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes _____	No _____
Lorillard Tobacco Company/Lorillard, Inc.	Yes _____	No _____
Liggett Group, Inc./Brooke Group, Ltd., Inc.	Yes _____	No _____
Council for Tobacco Research-U.S.A.	Yes _____	No _____
Tobacco Institute	Yes _____	No _____

[Negligence]

6. Are one or more of the Defendants negligent and was said negligence a legal cause of damage, injury or death to some smokers?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	Yes _____	No _____
RJ Reynolds Tobacco Company	Yes _____	No _____
Brown & Williamson Tobacco Corporation	Yes _____	No _____
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes _____	No _____
Lorillard Tobacco Company/Lorillard, Inc.	Yes _____	No _____
Liggett Group, Inc./Brooke Group, Ltd., Inc.	Yes _____	No _____

[Intentional Infliction of Emotional Distress]

7. Did one or more of the Defendants engage in extreme and outrageous conduct with the intent to cause severe emotional distress or with reckless disregard of the high probability of causing severe emotional distress to some smokers?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	Yes _____	No _____
RJ Reynolds Tobacco Company	Yes _____	No _____
Brown & Williamson Tobacco Corporation	Yes _____	No _____
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes _____	No _____
Lorillard Tobacco Company/Lorillard, Inc.	Yes _____	No _____
Liggett Group, Inc./Brooke Group, Ltd., Inc.	Yes _____	No _____
Council for Tobacco Research-U.S.A.	Yes _____	No _____
Tobacco Institute	Yes _____	No _____

[Breach of Express Warranty]

8. Did one or more of the Defendant Tobacco Companies sell or supply cigarettes that did not conform to representations of fact made by said Defendant(s), either orally or in writing, on which some smokers, relied to their detriment?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	Yes _____	No _____
RJ Reynolds Tobacco Company	Yes _____	No _____
Brown & Williamson Tobacco Corporation	Yes _____	No _____
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes _____	No _____
Lorillard Tobacco Company/Lorillard, Inc.	Yes _____	No _____
Liggett Group, Inc./Brooke Group, Ltd., Inc.	Yes _____	No _____

[Breach of Implied Warranty]

9. Did one or more of the Defendant Tobacco Companies sell or supply cigarettes that were defective in that they were not reasonably fit for the uses intended, causing loss, injury or damage to some smokers?

Please answer "Yes" or "No" as to each of the Defendants, below:

Philip Morris, Incorporated	Yes _____	No _____
RJ Reynolds Tobacco Company	Yes _____	No _____
Brown & Williamson Tobacco Corporation	Yes _____	No _____
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes _____	No _____
Lorillard Tobacco Company/Lorillard, Inc.	Yes _____	No _____
Liggett Group, Inc./Brooke Group, Ltd., Inc.	Yes _____	No _____

[Entitlement to Punitive Damages]

10. Under the circumstances of this case, state below whether punitive damages are warranted against:

Philip Morris, Incorporated	Yes _____	No _____
RJ Reynolds Tobacco Company	Yes _____	No _____
Brown & Williamson Tobacco Corporation	Yes _____	No _____
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes _____	No _____
Lorillard Tobacco Company/Lorillard, Inc.	Yes _____	No _____
Liggett Group, Inc./Brooke Group, Ltd., Inc.	Yes _____	No _____
Council for Tobacco Research-U.S.A.	Yes _____	No _____
Tobacco Institute	Yes _____	No _____

SO SAY WE ALL, this ___ day of _____, 1999.

_____
FOREPERSON

APPENDIX B

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION
Case No. 94-08273 CA (22)

HOWARD A. ENGLE, M.D., et al.,

Plaintiffs,

vs.

R.J. REYNOLDS TOBACCO COMPANY, et al.,

Defendants.

CERTAIN DEFENDANTS' PRELIMINARY DRAFT[1]

PHASE I TRIAL VERDICT FORM

The Court has instructed the jury on the law. Based on the those instructions and the evidence in the case, please answer the following questions.

[1] This preliminary draft form is submitted on behalf of all Defendants except Brown & Williamson Tobacco Corporation (for itself and for the defendant named as The American Tobacco Company), Liggett Group, Inc., and Brooke Group, Ltd., Inc.

Question No. 1. Have plaintiffs proven that cigarette smoking causes any of the following diseases in some smokers?

Aortic Aneurysm	Yes _____	No _____
Bladder Cancer	Yes _____	No _____
Cerebrovascular Disease	Yes _____	No _____
Cervical Cancer	Yes _____	No _____
Chronic Obstructive Pulmonary Disease	Yes _____	No _____
Coronary Heart Disease	Yes _____	No _____
Esophageal Cancer	Yes _____	No _____
Infertility	Yes _____	No _____
Kidney Cancer	Yes _____	No _____
Laryngeal Cancer	Yes _____	No _____
Leukemia	Yes _____	No _____
Lung Cancer		
Adenocarcinoma	Yes _____	No _____
Bronchioloalveolar carcinoma	Yes _____	No _____
Large cell carcinom	Yes _____	No _____
Small cell carcinoma	Yes _____	No _____
Squamous cell carcinoma	Yes _____	No _____
Miscarriage	Yes _____	No _____
Oral Cavity/Tongue Cancer	Yes _____	No _____
Pancreatic Cancer	Yes _____	No _____
Peripheral Vascular Disease	Yes _____	No _____
Pharyngeal Cancer	Yes _____	No _____
Stomach Cancer	Yes _____	No _____
Ulcers	Yes _____	No _____

If your answer to Question No. 1 is "No" as to all diseases, stop now, sign the verdict form, and inform the bailiff that you have reached a verdict. If your answer to Question No. 1 is "Yes" as to any disease, answer Question No. 2a.

Question No. 2a. Have plaintiffs proven that there was a technologically and commercially feasible alternative design for cigarettes, that was not made available to smokers, and that plaintiffs have proven would have prevented the types of diseases for which you checked "yes" in Question No. 1?

Yes _____ No _____

If your answer to Question No. 2a is "No," skip Question Nos. 2b, 3a and 3b, and go directly to Question No. 4a. If your answer to Question No. 2a is "Yes," answer Question No. 2b.

Question No. 2b. If you answered "Yes" to Question No. 2a, identify the periods of time during which plaintiffs have proven that there existed a technologically and commercially feasible alternative design for cigarettes that was not made available, and that would have prevented the types of diseases for which you checked "Yes" in Question No. 1, and identify the technologically and commercially feasible alternative design.

Periods of Time	Alternative Design
_____	_____
_____	_____

Question No. 3a. Have plaintiffs proven that any of the cigarettes manufactured by any defendant after July 1, 1974, was defective and unreasonably dangerous?

Yes _____ No _____

If your answer to Question No. 3a is "No," skip Question No. 3b, and go directly to Question No. 4a. If your answer to Question No. 3a is "Yes," answer Question No. 3b.

Question No. 3b. If you answered "Yes" to Question No. 3a, identify the specific defect(s) that plaintiffs have proven by identifying the defendant(s), the specific product(s) (brand and brand style) you find to be defective and unreasonably dangerous, the periods of time during which the product was defective and unreasonably dangerous, and the specific defect of the product, if any:

Defendant	Product (Brand & Brand Style)	Defect	Period of Time
_____	_____	_____	_____
_____	_____	_____	_____

Question No. 4a. Have plaintiffs proven that any defendant intentionally published a false statement of material fact in the State of Florida after May 4, 1982, knowing that the statement was false when published?

Yes _____ No _____

If your answer to Question No. 4a is "No," skip Question Nos. 4b, 5a and 5b, and go directly to Question No. 6a. If your answer to Question No. 4a is "Yes," answer Question No. 4b.

Question No. 4b. If your answer to Question No. 4a is "Yes," identify each false statement of material fact that plaintiffs have proven was published in the State of Florida after May 4, 1982, by listing the defendant that published the statement, the statement itself, the date the statement was published, and how the statement was published.

Defendant	False Statement Published in Florida	Date of Statement	Form of Publication
_____	_____	_____	_____
_____	_____	_____	_____

Question No. 5a. With respect to any false statement of material fact identified in response to Question No. 4b above, have plaintiffs proven that two or more of the defendants entered into a conspiracy to intentionally make that statement, knowing that the statement was false when made?

Yes _____ No _____

If your answer to Question No. 5a is "No," skip Question No. 5b and go directly to Question No. 6a. If your answer to Question No. 5a is "Yes," answer Question No. 5b.

Question No. 5b. If your answer to Question No. 5a is "Yes," identify which defendants plaintiffs have proven entered into such a conspiracy, when any such conspiracy was made, and the false statement of material fact that the identified defendants conspired to make.

Defendants Who Conspired	False Statement That Defendants Conspired To Make	Period of Time of Conspiracy
_____	_____	_____
_____	_____	_____

Question No. 6a. Have plaintiffs proven that any defendant did not exercise the degree of care which a reasonable cigarette manufacturer would exercise under like circumstances?

Yes _____ No _____

If your answer to Question No. 6a is "No," skip Question No. 6b, sign the verdict form and inform the bailiff that you have reached a verdict. If your answer to Question No. 6a is "Yes," answer Question No. 6b.

Question No. 6b. If your answer to Question No. 6a is "Yes," identify each defendant that plaintiffs have proven did not exercise a reasonable degree of care, the act by that defendant demonstrating the lack of that degree of care, the product (brand & brand style) that was the subject of that act, and the date upon which each act was committed.

Defendant	Product (Brand & Brand Style)	Act	Date of Act
_____	_____	_____	_____
_____	_____	_____	_____

Dated _____

_____
Foreperson

APPENDIX C

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION
Case No. 94-08273 CA (22)

HOWARD A. ENGLE, M.D., et al.,:
:
Plaintiffs,:
:
vs. :
:
R.J. REYNOLDS TOBACCO COMPANY,:
et al., :
:
Defendants.:

THE ORIGINAL FILED
ON JUN 14 1999
IN THE OFFICE OF
CIRCUIT COURT DADE CO. FL

OUTLINE OF PLAINTIFFS' PROPOSED PHASE I VERDICT FORM QUESTIONS AND CERTAIN DEFENDANTS' OBJECTIONS AND COUNTER-PROPOSALS THERETO[1]

For the Court's convenience, Certain Defendants[2] ("Defendants") have prepared this outline of Plaintiffs' proposed Phase I jury verdict questions and Defendants' objections and counter-proposals thereto. Where appropriate, this outline also attempts to reflect the Court's comments and the parties' agreement at the June 10, 1999, hearing.

[1] This submission is made without waiver of any arguments by defendants orally or in writing in connection with evidentiary objections or motions for decertification, summary judgment, directed verdict or mistrial or at the hearings of June 10-11, 1999.

[2] This submission is filed on behalf of all Defendants except Liggett Group, Inc., and Brooke Group, Ltd., Inc. Defendants Brown & Williamson Tobacco Corporation and The American Tobacco Company join except that there are certain alternative questions or approaches that B&W/ATCo have proposed as noted herein and as noted at the hearing on June 10 and 11, 1999. The non-B&W/ATCo defendants do not join in the B&W/ATCo alternative questions and approaches.

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CASE NO. 94-08273 CA22

[Questions Relating to General Causation]

PLAINTIFFS' PROPOSAL[3]:

Does smoking cigarettes cause one or more of the following diseases or medical conditions, in some smokers and former smokers?

Lung cancer	**Yes_____**	**No_____**
Emphysema	**Yes_____**	**No_____**
Chronic obstructive pulmonary disease	**Yes_____**	**No_____**
Cancer of the larynx/voice box	**Yes_____**	**No_____**
Cancer of the oral cavity/tongue	**Yes_____**	**No_____**
Heart disease	**Yes_____**	**No_____**
Complications in pregnancy	**Yes_____**	**No_____**
Esophageal cancer	**Yes_____**	**No_____**
Bladder cancer	**Yes_____**	**No_____**
Pancreatic cancer	**Yes_____**	**No_____**
Kidney cancer	**Yes_____**	**No_____**
Throat cancer	**Yes_____**	**No_____**
Stomach cancer	**Yes_____**	**No_____**
Pharyngeal cancer	**Yes_____**	**No_____**
Cervical cancer	**Yes_____**	**No_____**
Buerger's disease	**Yes_____**	**No_____**
Aortic aneurysm	**Yes_____**	**No_____**
Stroke	**Yes_____**	**No_____**
Asthma	**Yes_____**	**No_____**
Infertility	**Yes_____**	**No_____**
Pulmonary disease	**Yes_____**	**No_____**

If your answer to all of the diseases, above, is "no", your verdict is for the Defendants, and you should not proceed further except to date and sign this verdict form. If you answered "yes" to one or more of the above diseases or medical conditions, please answer all of the remaining questions on this verdict form.

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[3] Plaintiffs' proposal includes a bracketed heading for each question (e.g., "Negligence"). It appeared at the June 10, 1999, hearing that Plaintiffs are not requesting that such headings appear on the actual verdict form itself. See Tr. at 35883. In any event, Defendants object to Plaintiffs' headings as improper because Phase I deals not with complete causes of action, such as negligence, but only certain common questions relating to Plaintiffs' claims.

DEFENDANTS' OBJECTIONS:

- The order of the diseases and medical conditions is arbitrary, confusing and potentially prejudicial because it may lead the jury to speculate as to whether there is any significance to the order of the list; alphabetical order is appropriate.

- The reference to "former smokers" is improper and confusing.

- "Lung Cancer" should be broken down into the five different lung cell type cancers still at issue in the case (adenocarcinoma, bronchioloalveolar, large cell, small cell and squamous cell) to comport with the undisputed evidence that they are different diseases with different risk factors and different statistical associations with smoking. (Defendants' motion for directed verdict on bronchioloalveolar carcinoma is pending.)

- Reference to "Heart Disease" is improper and confusing because there are numerous different diseases of the heart and the Court has directed a verdict for Defendants with respect to several of them. The particular disease for which there is evidence of an association with smoking is "Coronary Heart Disease", which is related to Artherosclerosis.

- Reference to "Pulmonary Disease" is duplicative and confusing because there is no such disease separate from diseases such as lung cancer and COPD, which are also listed.

- Reference to "Emphysema" is duplicative and confusing because Emphysema is part of Chronic Obstructive Pulmonary Disease, which is also listed; it should be included as a form of COPD.

- Reference to "Complications in Pregnancy" is improper because the only such condition for which there is any evidence in the record is Miscarriage, which is also listed. (The Court has directed a verdict in favor of Defendants on intrauterine growth retardation (low birth weight).)

- Reference to "Throat Cancer" is duplicative and confusing because it necessarily relates to Esophageal Cancer or Laryngeal Cancer, which are also listed; if

"Throat Cancer" is listed at all, it should be as an alternative term for those other diseases.

- Reference to "Buerger's Disease" is duplicative and confusing because it is a form of Peripheral Vascular Disease; if Buerger's Disease is listed at all, it should be listed as a form of Peripheral Vascular Disease.

- Reference to "Stroke" is improper because Stroke is a symptom of Cerebral Vascular Disease; if Stroke is listed at all, it should be listed with Cerebral Vascular Disease.

- Inclusion of Asthma is improper because the Court has already directed a verdict in favor of Defendants on Asthma except with respect to "asthmatic conditions related to COPD". However, including "asthmatic conditions related to COPD" would be improper because the only other asthmatic condition mentioned in the trial was asthmatic bronchitis and the testimony did not identify smoking as a cause of that condition. In any event, if "asthmatic conditions related to COPD" are to be included at all, they should be subsumed into COPD.

- Inclusion of the following diseases is improper because there is insufficient evidence to support Plaintiffs' claims with respect to them: Stomach Cancer, Cervical Cancer, Kidney Cancer and Bronchioloalveolar Cancer (a form of lung cancer); Defendants' motion for directed verdict on these diseases is currently pending.

DEFENDANTS' PROPOSAL (as modified to reflect agreement of the parties and statements of the Court on June 10, 1999):

Have plaintiffs proven that cigarette smoking causes any of the following diseases in some smokers?

Aortic Aneurysm	**Yes** _____	**No** _____
Bladder Cancer	**Yes** _____	**No** _____
Cerebrovascular Disease (including Stroke)	**Yes** _____	**No** _____
Cervical Cancer	**Yes** _____	**No** _____
Chronic Obstructive Pulmonary Disease (including emphysema)	**Yes** _____	**No** _____
Coronary Heart Disease	**Yes** _____	**No** _____
Esophageal (Throat) Cancer	**Yes** _____	**No** _____

Infertility	**Yes _____**	**No _____**
Kidney Cancer	**Yes _____**	**No _____**
Laryngeal (Throat or Voice Box) Cancer	**Yes _____**	**No _____**
Lung Cancer		
Adenocarcinoma	**Yes _____**	**No _____**
Bronchioloalveolar carcinoma	**Yes _____**	**No _____**
Large cell carcinoma	**Yes _____**	**No _____**
Small cell carcinoma	**Yes _____**	**No _____**
Squamous cell carcinoma	**Yes _____**	**No _____**
Miscarriage	**Yes _____**	**No _____**
Oral Cavity/Tongue Cancer	**Yes _____**	**No _____**
Pancreatic Cancer	**Yes _____**	**No _____**
Peripheral Vascular Disease (including Buerger's Disease)	**Yes _____**	**No _____**
Pharyngeal Cancer	**Yes _____**	**No _____**
Stomach Cancer	**Yes _____**	**No _____**

If your answer to this question is "No" as to all diseases, stop now, sign the verdict form, and inform the bailiff that you have reached a verdict. If your answer to this question is "Yes" as to any disease, answer the following questions.

(N.B. If Defendants' pending motions for directed verdict on Cervical Cancer, Broncioloalveolar Carcinoma, Kidney Cancer and Stomach Cancer are granted, those diseases would be removed from the list.)

B&W/ATCo PROPOSAL

- There should be no causation question at all for the reasons stated on June 10, 1999.
- If there is to be a causation question, it should read as follows:

  Has it been proven that cigarette smoking causes one or more of the following diseases?

- There should be no reference to "in some smokers".
- If there is to be a causation question, B&W/ATCo join in Defendants' list of diseases.

- If there is to be a causation question, it should be accompanied by a second question, which follows the first and reads as follows:

  Have plaintiffs proven that defendants' statements on causation prevented Florida smokers from being aware of the risks of smoking?

  Yes _____ No _____

- B&W/ATCo join in all objections.

[Questions Relating to Addiction]

PLAINTIFFS' PROPOSAL:

Are cigarettes that contain nicotine addictive or dependence producing in some smokers?

Yes ____ No ____

DEFENDANTS' OBJECTIONS:

- This question is not appropriate for Phase I because, according to the testimony of both Plaintiffs' and Defendants' witnesses, addiction is an individualized issue.

- The term "addictive" is vague, ambiguous and confusing; the testimony at trial by both Plaintiffs' and Defendants' expert witnesses was that the term means different things to different people at different times; the jury would not know what was being asked.

- Reference to "dependence producing" is improper. The class is defined by "addiction", the term chosen by Plaintiffs and used for purposes of certification and notice to the class. The testimony at trial by Plaintiffs' witnesses and Defendants' witnesses was that "addiction" and "dependence" do not necessarily mean the same thing. In addition, the evidence showed that "dependence" incorporates the notion of "habit". If the Court includes "dependence producing" here, then it should also include "habit-forming".

- Given the ambiguity of "addiction", the question is meaningless and does not go to the elements of any claim by Plaintiffs. The proper "addiction"-related inquiry, if any, is whether smokers can quit or not. (See follow-up question in Defendants' Backup Proposal, below.)

DEFENDANTS' PRIMARY PROPOSAL:

[No question on addiction.]

DEFENDANTS' BACKUP PROPOSAL:

If the Court decides, over Defendants' objection, to ask the jury any addiction question(s) at all, Defendants propose the following:

Have plaintiffs proven that nicotine causes some smokers to become addicted to cigarettes?

Yes _____ No _____

If your answer to this question is "No", stop now, sign the verdict form and inform the bailiff that you have reached a verdict. If your answer to this question is "Yes", answer the following question.

Have plaintiffs proven that addicted smokers are not able to quit?

Yes _____ No _____

B&W/ATCo BACKUP PROPOSAL

- There should be no question on addiction for the reasons noted above. B&W/ATCo joins in the objections.
- B&W/ATCo proposes that, if there is to be a question, it should read as follows:

Have plaintiffs proven that smokers are unable to quit smoking because of their addiction to nicotine?

Yes _____ No _____

CASE NO. 94-08273 CA22

[Questions Relating to Claim for Strict Liability]

PLAINTIFFS' PROPOSAL:

Did one or more of the Defendant Tobacco Companies place cigarettes on the market that were defective/unreasonably dangerous and a legal cause of loss, injury or damage to some smokers?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	**Yes____**	**No____**
RJ Reynolds Tobacco Company	**Yes____**	**No____**
Brown & Williamson Tobacco Corporation	**Yes____**	**No____**
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	**Yes____**	**No____**
Lorillard Tobacco Company/ Lorillard, Inc.	**Yes____**	**No____**
Liggett Group, Inc./ Brooke Group, Ltd., Inc.	**Yes____**	**No____**

DEFENDANTS' OBJECTIONS:

- The term "defective/unreasonably dangerous" is vague, confusing and improper; it may suggest to the jury that "defect" and "unreasonable danger" are alternatives. The proper term under Florida law is "defective and unreasonably dangerous".

- The tag line "and a legal cause . . . ." is improper because legal cause has not been tried and cannot be determined in Phase I; no evidence was presented in Phase I that would support submission of this issue to the jury.

- The question fails to ask for specifics (defect, time period, product), which renders it useless for application to individual plaintiffs in this case.

- The question fails to specify the time limitation imposed by the statute of repose for products liability claims (i.e., claim limited to post-July 1, 1974).

- The question fails to ask about alternative design, which has been an element of Plaintiffs' strict

liability claim since they filed their complaint (see ¶85(f)(i)) and is potentially dispositive of their claim. If the alternative design question is answered in the negative, there is no need to ask the defect question.

DEFENDANTS' PROPOSAL:

Have plaintiffs proven that there was a technologically and commercially feasible alternative design for cigarettes, that was not made available to smokers, and that plaintiffs have proven would have prevented the types of diseases for which you checked "yes" in Question No. _____ [the general causation question]?

Yes _____ No _____

If your answer to the preceding question is "No," skip the following questions in this section. If your answer to the preceding question is "Yes," answer the following questions.

If you answered "Yes" to the preceding Question, identify the periods of time during which plaintiffs have proven that there existed a technologically and commercially feasible alternative design for cigarettes that was not made available, and that would have prevented the types of diseases for which you checked "Yes" in Question No. _____ [the general causation question] and identify the technologically and commercially feasible alternative design.

Periods of Time	Alternative Design
_____	_____
_____	_____

Have plaintiffs proven that any of the cigarettes manufactured by any defendant after July 1, 1974, was defective and unreasonably dangerous?

Yes _____ No _____

If your answer to the preceding question is "No," skip the following questions in this section. If your answer to the preceding question is "Yes," answer the following questions.

If you answered "Yes" to the preceding question, identify the specific defect(s) that plaintiffs have proven by identifying the defendant(s), the specific product(s) (brand and brand style) you find to be defective and unreasonably dangerous, the periods of time during which the product was defective and unreasonably dangerous, and the specific defect of the product, if any:

Defendant	Product (Brand & Brand Style)	Defect	Period of Time
_____	_____	_____	_____
_____	_____	_____	_____

B&W/ATCo PROPOSAL

- B&W/ATCo concur in Defendants' objections and proposal, but submit that this group of questions should be headed "COUNT I". This type of heading will assit the jury in knowing that the questions relate to particular parts of claims made in the case on which the Court will instruct them. The Phase I trial, of course, cannot result in a judgment in favor of the Plaintiffs on any count.

- Whenever B&W and ATCo are referenced, they should be listed as:

Brown & Williamson Tobacco Corporation Yes ___ No ___
The American Tobacco Company Yes ___ No ___

[Questions Relating to Claim for Fraud and Misrepresentation]

PLAINTIFFS' PROPOSAL:

Did one or more of the Defendants make a false statement concerning a material fact, or conceal a material fact, either knowing the statement was false or misleading, or being without knowledge as to its truth or falsity, with the intention of misleading smokers and members of the public?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	**Yes_____**	**No_____**
RJ Reynolds Tobacco Company	**Yes_____**	**No_____**
Brown & Williamson Tobacco Corporation	**Yes_____**	**No_____**
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	**Yes_____**	**No_____**
Lorillard Tobacco Company/ Lorillard, Inc.	**Yes_____**	**No_____**
Liggett Group, Inc./ Brooke Group, Ltd., Inc.	**Yes_____**	**No_____**
Council for Tobacco Research-U.S.A.	**Yes_____**	**No_____**
Tobacco Institute	**Yes_____**	**No_____**

DEFENDANTS' OBJECTIONS:

- Reference to "a false statement concerning a material fact" is improper because a claim of fraud must be based on a false statement of material fact (e.g., a false statement of opinion about a material fact is not actionable).

- Reference to "conceal[ment]" is improper because there is no general duty to disclose under Florida law and because of federal preemption relating to disclosure of information about the health effects of smoking cigarettes.

- Reference to "misleading" statements is improper because the legal standard requires that the statement be false.

- Reference to "being without knowledge as to its truth or falsity" is improper because the legal standard

requires that the maker of the statement know that it is false or know that he is without knowledge as to its truth or falsity.

- Reference to an intention to "mislead" is improper because the legal standard requires an intention that the plaintiffs act to their detriment.

- Reference to the "public" is improper because the only relevant persons are the plaintiffs; the "public" is not a party claiming fraud in this case and Florida does not recognize a claim for fraud on the public.

- The question fails to specify the time limitation imposed by the statute of repose for fraud claims (i.e., claim limited to post-May 5, 1982).

- The question fails to specify that the false statement must have been published in Florida.

- The question fails to ask for specifics (defendant, statement, time, manner of publication), which renders it useless for application to individual plaintiffs in this case.

DEFENDANTS' PROPOSAL:

Have plaintiffs proven that any defendant intentionally published a false statement of material fact in the State of Florida after May 5, 1982, knowing that the statement was false when published?

Yes _____ No _____

If your answer to the question is "No," skip the remaining questions in this section. If your answer to this question is "Yes," answer the following question.

If your answer to the preceding question is "Yes," identify each false statement of material fact that plaintiffs have proven was published in the State of Florida after May 5, 1982, by listing the defendant that published the statement, the statement itself, the date the statement was published, and how the statement was published.

Defendant	False Statement Published in Florida	Date of Statement	Form of Publication
_____	_____	_____	_____
_____	_____	_____	_____

B&W/ATCo PROPOSAL

- The first Defendants' question should be preceded by a question which reads:

  Have plaintiffs proven that defendants' statements on causation prevented Florida smokers from being aware of the risks of smoking?

  Yes _____ No _____

- These questions should be headed "COUNT II".

- B&W/ATCo otherwise concur in Defendants' objections and proposal.

CASE NO. 94-08273 CA22

[Questions Relating to Claim for Civil Conspiracy]

PLAINIFFS' PROPOSAL:

Did two or more of the Tobacco Companies enter into an agreement to conceal, suppress or misrepresent information regarding the health effects of cigarette smoking, or the addictiveness of smoking, with the intention that smokers and members of the public rely to their detriment?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	**Yes_____**	**No_____**
RJ Reynolds Tobacco Company	**Yes_____**	**No_____**
Brown & Williamson Tobacco Corporation	**Yes_____**	**No_____**
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	**Yes_____**	**No_____**
Lorillard Tobacco Company/ Lorillard, Inc.	**Yes_____**	**No_____**
Liggett Group, Inc./ Brooke Group, Ltd., Inc.	**Yes_____**	**No_____**
Council for Tobacco Research-U.S.A.	**Yes_____**	**No_____**
Tobacco Institute	**Yes_____**	**No_____**

DEFENDANTS' OBJECTIONS:

- References to "conceal[ment]", "suppress[ion]" and "misrepresent[ation]" are improper because such conduct is not necessarily tortious and Plaintiffs' conspiracy claim requires that the alleged conspiracy be related to an underlying tort. Such references are also improper because of federal preemption relating to cigarettes.

- The reference to "the addictiveness of smoking" is improper because it assumes a fact in dispute.

- Reference to "members of the public" is improper because the public is not a party to this case; the only relevant persons for this purpose are the Plaintiffs.

- The question fails to ask for specifics (e.g., to which statements the alleged agreement relates), which

renders it useless for application to individual plaintiffs in this case.

DEFENDANTS' PROPOSAL:

With respect to any false statement of material fact identified in response to Question No. _____ [the question relating to fraud], have plaintiffs proven that two or more of the defendants entered into a conspiracy to intentionally make that statement, knowing that the statement was false when made?

Yes _____ No _____

If your answer to the preceding question is "No", skip the following question. If your answer to the preceding question is "Yes", answer the following question.

If your answer to the preceding question is "Yes", identify which defendants plaintiffs have proven entered into such a conspiracy, when any such conspiracy was made, and the false statement of material fact that the identified defendants conspired to make.

Defendants Who Conspired	False Statement That Defendants Conspired To Make	Period of Conspiracy
_____	_____	_____
_____	_____	_____

B&W/ATCo PROPOSAL

- B&W/ATCo concurs in Defendants' objections and proposal, except to state that this question should be headed "COUNT III".

CASE NO. 94-08273 CA22

[Questions Relating to Claim for Negligence]

PLAINTIFFS' PROPOSAL:

Are one or more of the Defendants negligent and was said negligence a legal cause of damage, injury or death to some smokers?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	**Yes____**	**No____**
RJ Reynolds Tobacco Company	**Yes____**	**No____**
Brown & Williamson Tobacco Corporation	**Yes____**	**No____**
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	**Yes____**	**No____**
Lorillard Tobacco Company/ Lorillard, Inc.	**Yes____**	**No____**
Liggett Group, Inc./ Brooke Group, Ltd., Inc.	**Yes____**	**No____**

DEFENDANTS' OBJECTIONS:

- Reference to "negligence" is improper because the complete tort of negligence (including cause-in-fact and proximate cause) has not been tried and cannot be determined in Phase I. In this Phase of the case, the only negligence-related issue that can be determined is whether reasonable care was exercised.

- The tag line "and a legal cause . . . ." is improper because legal cause has not been tried and cannot be determined in Phase I; no evidence was presented in Phase I that would support submission of this issue to the jury.

- The question fails to ask for specifics (e.g., conduct), which renders it useless for application to individual plaintiffs in this case.

DEFENDANTS' PROPOSAL:

Have plaintiffs proven that any defendant did not exercise the degree of care which a reasonable cigarette manufacturer would exercise under like circumstances?

Yes _____ No _____

If your answer to this question is "No," skip the next question. If your answer to this question is "Yes", answer the following question.

If your answer to the preceding question is "Yes", identify each defendant that plaintiffs have proven did not exercise a reasonable degree of care, the act by that defendant demonstrating the lack of that degree of care, the product (brand & brand style) that was the subject of that act, and the date upon which each act was committed.

Defendant	Product (Brand & Brand Style)	Act	Date of Act
_____	_____	_____	_____
_____	_____	_____	_____

B&W/ATCo PROPOSAL

- B&W/ATCo concur in Defendants' objections and proposal, except to state that these questions should be headed "COUNT VI".

[Questions Relating to Claim for Intentional Infliction of Emotional Distress]

PLAINTIFFS' PROPOSAL:

Did one or more of the Defendants engage in extreme and outrageous conduct with the intent to cause severe emotional distress or with reckless disregard of the high probability of causing severe emotional distress to some smokers?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	**Yes____**	**No____**
RJ Reynolds Tobacco Company	**Yes____**	**No____**
Brown & Williamson Tobacco Corporation	**Yes____**	**No____**
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	**Yes____**	**No____**
Lorillard Tobacco Company/ Lorillard, Inc.	**Yes____**	**No____**
Liggett Group, Inc./ Brooke Group, Ltd., Inc.	**Yes____**	**No____**
Council for Tobacco Research-U.S.A.	**Yes____**	**No____**
Tobacco Institute	**Yes____**	**No____**

DEFENDANTS' OBJECTIONS:

- This question should not appear on the verdict form because the claim is legally deficient. (Defendants' motion for directed verdict on this claim is currently pending.) Florida law permits this "gap-filler", non-traditional claim only where the plaintiff has no traditional claims available because they cannot allege the requisite physical injury or impact, and only suffered mental distress. Because all members of the putative class by definition can and must allege physical injury here, they must pursue their claims and damages, including any damages for emotional distress, through the traditional tort theories. Th eclaim of intentional infliction is not available.

- The question is also factually deficient because there is no evidence in the record to support a finding of intent to cause emotional distress.

- The question is improperly broad because it is not limited to the design of cigarettes, which has been the gravamen of Plaintiffs' claim for intentional infliction since they filed their complaint (see ¶131).

- Plaintiffs' proposed question fails to focus on Defendants' conduct in the design of cigarettes sold to particular persons, as required by Florida law.

- Intentional infliction of emotional distress claims are to be used when someone suffers and is intended to suffer emotional distress without physical injury as a result of conduct that goes beyond all possible bounds of decency and is regarded as shocking, atrocious, and utterly intolerable in a civilized society. Inclusion of such a question on this record would be legally inaccurate and highly prejudicial.

DEFENDANTS' PRIMARY PROPOSAL:

[No question on intentional infliction of emotional distress.]

DEFENDANTS' BACKUP PROPOSAL:

If the Court decides, over Defendants' objection, to ask any intentional infliction question(s) at all, Defendants propose the following:

Have plaintiffs proven that one or more of the defendants engaged in extreme and outrageous conduct in the design of cigarettes sold to Florida smokers with the intent to inflict severe emotional distress upon a particular Florida smoker?

Yes _____ No _____

If your answer to this question is "No," skip the next question. If your answer to this question is "Yes," answer the following question.

If your answer to the previous question is "Yes," identify such conduct, each defendant who engaged in such conduct and the period of time during which such conduct occurred.

Defendant	Conduct	Period of Time
_____	_____	_____
_____	_____	_____

B&W/ATCo PROPOSAL

- B&W/ATCo concur in Defendants' objections and backup proposal, except to state that this question should be headed "COUNT V".

[Questions Relating to Claim for Breach of Express Warranty]

PLAINTIFFS' PROPOSAL:

Did one or more of the Defendant Tobacco Companies sell or supply cigarettes that did not conform to representations of fact made by said Defendant(s), either orally or in writing, on which some smokers, relied to their detriment?

Please answer "Yes" or "No" as to each Defendant, below.

Philip Morris, Incorporated	**Yes____**	**No____**
RJ Reynolds Tobacco Company	**Yes____**	**No____**
Brown & Williamson Tobacco Corporation	**Yes____**	**No____**
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	**Yes____**	**No____**
Lorillard Tobacco Company/ Lorillard, Inc.	**Yes____**	**No____**
Liggett Group, Inc./ Brooke Group, Ltd., Inc.	**Yes____**	**No____**

DEFENDANTS' OBJECTIONS:

- This question should not appear on the verdict form. (Defendants' motion for direct verdict on this claim on numerous grounds is currently pending.) Florida law does not recognize a cause of action for breach of express warranty against a manufacturer who is not in privity of contract with the plaintiff.

- In order for there to be privity of contract, there has to be a direct sale by a manufacturer to a cigarette consumer who makes a purchase. There is no evidence of that in the record. In addition, coupons, advertising, and gifts do not suffice to create privity of contract.

- Even if the Court does not find that there has been no proof of privity whatsoever, warranty claims turning on unique, individual claims of privity cannot be tried in Phase I.

- Reference to "reli[ance]" is improper because reliance has not been tried and cannot be determined in Phase I;

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no evidence has been presented in Phase I that would support submission of this issue to the jury. Sections 3A and 4A of the trial plan provide that reliance and other individual issues are to be determined in Phases II and III.

- Reference to "supply" is improper because Florida law requires a sale for a breach of express warranty claim.

- The question fails to state that the "representation of fact" must be in connection with a sale of cigarettes.

- The question fails to ask for specifics (e.g., the particular warranties and sales), which renders it useless for application to individual plaintiffs in this case.

DEFENDANTS' PRIMARY PROPOSAL:

[No question on express warranty.]

DEFENDANTS' BACKUP PROPOSAL:

If the Court decides, over Defendants' objection, to ask any express warranty question(s) at all, Defendants propose the following:

Have plaintiffs proven that any defendant sold any cigarettes directly to Florida smokers (as opposed to Florida smokers purchasing cigarettes from retail merchants)?

Yes _____ No _____

If your answer to this question is "No," skip the remaining questions in this section. If your answer to this question is "Yes," answer the following question.

If your answer to the previous question is "Yes," identify the defendant or defendants that plaintiffs have proven made direct sales to Florida smokers, when any such direct sales were made, and what specific brand and brand style of cigarettes were the subject of those direct sales.

Defendant	Period of Direct Sales	Product(s) (Brand & Brand Style)
_____	_____	_____
_____	_____	_____

With respect to the cigarettes identified in response to the preceding question, have plaintiffs proven that any defendant orally or in writing made an express warranty in connection with the direct sale of any of those cigarettes to a Florida smoker about the risks of smoking?

Yes _____ No _____

If your answer to this question is "No," skip the remaining questions in this section. If your answer to this question is "Yes," answer the following question.

If your answer to the preceding question is "Yes," identify the defendant(s) that plaintiffs have proven made any such warranty(ies), the cigarette(s) (brand and brand style) that was (were) the subject of the warranty(ies), the specific warranty(ies) made by that defendant at that time about the cigarette, and the time when the warranty(ies) was (were) made.

Defendant	Product (Brand & Brand Style)	Warranty Made About That Brand & Brand Style	Period of Time
_____	_____	_____	_____
_____	_____	_____	_____

Have plaintiffs proven that any of the cigarettes identified in response to the preceding question did not conform to the warranty(ies) made by the defendant(s) in connection with the sale of those cigarettes?

Yes _____ No _____

If your answer to the preceding question is "No," skip the remaining question in this section. If your answer to this question is "Yes," answer the following question.

If your answer to the preceding question is "Yes," identify each cigarette that plaintiffs have proven did not conform to the warranty(ies) made by the defendant(s) by identifying the defendant, the brand and brand style of cigarette(s), the manner in which the cigarette(s) failed to conform to the warranty(ies) made, and the time period during which the cigarette(s) failed to conform to the warranty(ies) made.

Defendant	Product (Brand & Brand Style)	How Cigarette Failed To Conform to Warranty	Period of Time
_____	_____	_____	_____
_____	_____	_____	_____

B&W/ATCo PROPOSAL

- B&W/ATCo concur in Defendants' objections and backup proposal, except to state that these questions should be headed "COUNT VIII".

CASE NO. 94-08273 CA22

[Questions Relating to Claim for Breach of Implied Warranty]

PLAINTIFFS' PROPOSAL:

Did one or more of the Defendant Tobacco Companies sell or supply cigarettes that were defective in that they were not reasonably fit for the uses intended, causing loss, injury or damage to some smokers?

Please answer "Yes" or "No" as to each of the Defendants, below:

Philip Morris, Incorporated	**Yes_____**	**No_____**
RJ Reynolds Tobacco Company	**Yes_____**	**No_____**
Brown & Williamson Tobacco Corporation	**Yes_____**	**No_____**
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	**Yes_____**	**No_____**
Lorillard Tobacco Company/ Lorillard, Inc.	**Yes_____**	**No_____**
Liggett Group, Inc./ Brooke Group, Ltd., Inc.	**Yes_____**	**No_____**

DEFENDANTS' OBJECTIONS:

- This question should not appear on the verdict form. (Defendants' motion for directed verdict on this claim on numerous grounds is currently pending.) Absent privity of contract, the doctrine of strict liability in tort has replaced breach of implied warranty claims. The Florida Standard Jury Instructions, Comment on Model Charge 7, states that an implied warranty claim should be omitted from the verdict form if a strict liability claim exists in the case.

- In order for there to be privity of contract, there has to be a direct sale by a manufacturer to a cigarette consumer who makes a purchase. There is no evidence of that in the record. In addition, coupons, advertising, and gifts do not suffice to create privity of contract.

- Reference to "supply" is improper because Florida law requires a sale for a breach of implied warranty claim

- Plaintiffs' use of the phrase "causing loss, injury or damage" is improper because specific causation has not

been tried and cannot be determined in Phase I; no evidence has been presented in Phase I that would support submission of this issue to the jury. Sections 3 and 4 of the trial plan provide that specific causation, along with other individual issues, will be determined in Phases II and III.

- Reference to "defective" cigarettes is improper because it confuses this question with the question relating to strict liability.

DEFENDANTS' PRIMARY PROPOSAL:

[No question on implied warranty.]

DEFENDANTS' BACKUP PROPOSAL:

If the Court decides, over Defendants' objection, to ask any implied warranty question(s) at all, Defendants propose the following:

Have plaintiffs proven that any defendant sold any cigarettes directly to Florida smokers (as opposed to Florida smokers purchasing cigarettes from retail merchants)?

Yes _____ No _____

If your answer to this question is "No," skip the remaining questions in this section. If your answer to this question is "Yes," answer the following question.

If your answer to the previous question is "Yes," identify the defendant or defendants that plaintiffs have proven made direct sales to Florida smokers, when any such direct sales were made, and what specific brand and brand style of cigarettes were the subject of those direct sales.

Defendant	**Period of Direct Sales**	**Product(s) (Brand & Brand Style)**
_____	_____	_____
_____	_____	_____

Have plaintiffs proven that any of the cigarettes identified in response to the preceding question were not reasonably fit for the ordinary and reasonably foreseeable use of cigarettes?

Yes _____ No _____

If your answer to this question is "No," skip the remaining questions in this section. If your answer to this question is "Yes," answer the following question.

If your answer to the preceding question is "Yes, identify for each cigarette that plaintiffs have proven was not reasonably fit, the defendant who manufactured the cigarette, the brand and brand style of the cigarette, the manner in which the cigarette was not reasonably fit for its ordinary and reasonably foreseeable use, and the period of time during which the cigarette was not reasonably fit.

Defendant	Product (Brand & (Brand Style	Manner In Which Cigarette Not Reasonably Fit	Period of Time
_____	_____	_____	_____
_____	_____	_____	_____

B&W/ATCo PROPOSAL

- B&W/ATCo concur in Defendants' objections and backup proposal, except to state that these questions should be headed "COUNT IV".

CASE NO. 94-08273 CA22

[Questions Relating to Claim for Punitive Damages]

PLAINTIFFS' PROPOSAL:

Under the circumstances of this case, state below whether punitive damages are warranted against:

Philip Morris, Incorporated	**Yes____**	**No____**
RJ Reynolds Tobacco Company	**Yes____**	**No____**
Brown & Williamson Tobacco Corporation	**Yes____**	**No____**
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	**Yes____**	**No____**
Lorillard Tobacco Company/ Lorillard, Inc.	**Yes____**	**No____**
Liggett Group, Inc./ Brooke Group, Ltd., Inc.	**Yes____**	**No____**
Council for Tobacco Research-U.S.A.	**Yes____**	**No____**
Tobacco Institute	**Yes____**	**No____**

DEFENDANTS' OBJECTIONS:

- This question should not appear on the verdict form because both Florida and U.S. constitutional law prohibit a determination of punitive damages absent a determination of liability. (Defendants' motion to move this issue to Phase II is currently pending.)

- There is evidence that has not been presented in this Phase (because it did not relate to a common issue) that would be relevant to the determination of punitive damages. For example, the jury has not heard any evidence relating Defendants' alleged conduct to Plaintiffs' alleged injuries or conduct.

- Asking whether punitive damages are "warranted" is improper because the appropriateness of an actual award of punitive damages has not been tried and cannot be determined in Phase I. The "standard" instruction is inappropriate for this non-standard case.

- The question fails to ask for specifics (e.g., conduct), rendering it useless for application to individual Plaintiffs in subsequent proceedings in this case.

- The question fails to specify that the appropriate standard of proof for punitive damages is clear and convincing evidence.

- The question fails to indicate that it should be answered only if the questions related to fraud and intentional infliction have been answered in the affirmative.

- The question fails to specify that the conduct for which punitive damages may potentially be awarded must be post-May 5, 1990, reflecting that the limitations period for punitive damages runs from the date of the conduct at issue.

DEFENDANTS' PRIMARY PROPOSAL:

[No question on punitive damages.]

DEFENDANTS' BACKUP PROPOSAL:

If the Court, over Defendants' objection, decides to ask any punitive damages question(s) at all, Defendants propose the following:

Answer this question only if you answered "Yes" to [the fraud question] or [the intentional infliction of emotional distress question] as to one or more defendant(s).

Have plaintiffs proven by clear and convincing evidence that the conduct of any defendant [after May 5, 1990] rose to a level that would permit a potential award of punitive damages?

Yes _____ No _____

If your answer to the preceding question is "Yes," identify the defendant(s) whose conduct plaintiffs have proven rose to a level that would permit a potential award of punitive damages, identify the specific conduct, and identify the time period during which the conduct occurred.

Defendant	Conduct	Time Period
_____	_____	_____
_____	_____	_____

B&W/ATCo PROPOSAL

- B&W/ATCo concur in Defendants' objections, but proposes re-working Defendants' question as follows:

> **Under instructions provided by the Court, have plaintiffs proven by clear and convincing evidence that the conduct of any defendant since May 5, 1990, was so extreme and outrageous as to meet the threshold test for a potential award of punitive damages?**
>
> **Yes _____ No _____**
>
> **If you answer the preceding question "Yes", identify the defendant(s) whose conduct plaintiffs have proven was so extreme and outrageous as to meet the threshold test, identify the specific conduct, and identify the time period during which the conduct occurred.**

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by hand delivery to plaintiffs' counsel and to counsel for Liggett Group Inc., and Brooke Group Ltd., on this 14th day of June 1999.

Robert C. Heim, Esq.
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By: Robert C. Heim
Robert C. Heim, Esq.

APPENDIX D

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 94-08273 CA (22)

HOWARD A. ENGLE, M.D., ROBERT W. ANGELL, RAYMOND LACEY, FROSENE D. STEEVENS, FRANK AMODEO, MARY FARNAN, LOREN E. LOWERY, ANGIE DELLA VECCHIA and MICHAEL MATYI, on behalf of themselves and all others similarly situated,

FLA. BAR NOS: 068445
142163

Plaintiffs,

v

DRAFT-I

RJ REYNOLDS TOBACCO COMPANY, RJR NABISCO, INC., PHILIP MORRIS INCORPORATED ("PHILIP MORRIS U.S.A."), PHILIP MORRIS COMPANIES, INC., LORILLARD TOBACCO COMPANY, LORILLARD, INC., THE AMERICAN TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORP., LIGGETT GROUP, INC., BROOKE GROUP, LTD., INC., COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC. and TOBACCO INSTITUTE, INC.,

Defendants.

_____/

ENGLE CLASS NOTICE OF FILING FRAUD, MISREPRESENTATION AND CIVIL CONSPIRACY QUESTIONS FOR USE WITH JURY VERDICT FORM

The Engle Class, by and through Class Counsel file their Notice of Filing issues on fraud, misrepresentation and civil conspiracy, and state:

1. In the event this Court determines that it is appropriate to ask questions of the jurors on the fraud, misrepresentation and civil conspiracy counts, the

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Plaintiff Class has prepared the attached list of questions. These were taken primarily from the Engle Amended Complaint and each question is supported by evidence in the case through testimony and exhibits.

2. It is the position of the Plaintiff Class that the pattern of fraud, deception and concealment and the conspiracy has been ongoing for approximately a half century. The list of specific fraud, misrepresentation and conspiracy issues is necessarily a long one.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was hand delivered to: Robert Heim, Esquire, First Union Financial Center, 200 South Biscayne Boulevard, Suite 3000, Miami, Florida 33131; and Kelly Anne Luther, Esquire, Clarke, Silvergate, Williams & Montgomery, P.A., Suite 2401, New World Tower, 100 N. Biscayne Boulevard, Miami, Florida 33132 this 4th day of June, 1999.

STANLEY M. ROSENBLATT, P.A.
66 West Flagler Street
12th Floor, Concord Building
Miami, Florida 33130
(305) 374-6131

By: Susan Rosenblatt /fm
STANLEY M. ROSENBLATT

By: Susan Rosenblatt
SUSAN ROSENBLATT

ISSUES ON FRAUD AND MISREPRESENTATION

Did the Plaintiff Class prove by the greater weight of the evidence that one or more of the Defendants did the following?

Please answer "Yes" or "No" after each question.

1. Did one or more of the Defendant Tobacco Companies manipulate the levels of nicotine in cigarettes?

Yes_____ No_____

2. Did one or more of the Defendants conceal from the public and the United States Government, internal research establishing that nicotine is addictive?

Yes_____ No_____

3. Has the Council for Tobacco Research served as a public relations front for the member Defendant Tobacco Companies?

Yes_____ No_____

4. Have one or more of the Defendants, either individually, in concert, or through the Council for Tobacco Research or the Tobacco Institute, misled the public by asserting that there is a legitimate controversy as to whether smoking cigarettes cause lung cancer and other diseases – with full knowledge that there is on controversy and smoking does cause lung cancer and other diseases?

Yes_____ No_____

5. Did the Chief Executive Officers from each of the Defendant Tobacco Companies falsely state the following before Congress:

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(i) Smoking cigarettes does not cause lung cancer?

Yes_____ No_____

(ii) Nicotine is not addictive?

Yes_____ No_____

(iii) It is unknown whether any person has ever died from smoking cigarettes?

Yes_____ No_____

6. Did one or more of the Defendant Tobacco Companies intentionally target underage teenagers and children through expansive advertising and promotional campaigns, while claiming the opposite – that the Defendant Tobacco Companies do not market or advertise to underage smokers and do their best to discourage underage smokers?

Yes_____ No_____

7. Has the Tobacco Industry, including all Defendants, spent billions of dollars to hide, cover up and obscure the true facts about smoking and health?

Yes_____ No_____

8. Was Dr. William Ray Morgan, a scientist at Philip Morris, directed to destroy test results revealing that commercial cigarettes had a very high level of nitrosamines, cancer causing carcinogens?

Yes_____ No_____

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9. Was Dr. Frederick Homburger, a grantee of the Council for Tobacco Research, pressured by representatives of the Defendant Tobacco Companies and the Defendant Council for Tobacco Research, to change his scientific findings so as to not reveal that smoking causes cancer of the larynx in hamsters?

Yes_____ No_____

10. Did Philip Morris prohibit its scientists from conducting safety testing on Philip Morris' commercial cigarettes and those of other Defendant tobacco companies because such testing was to be done solely overseas, where negative results would not be available to Plaintiffs in smoking and health litigation within the United States?

Yes_____ No_____

11. Did Philip Morris not permit animal testing within Philip Morris' facilities in the United States, but only in Europe where negative results would not be discoverable in U.S. litigation?

Yes_____ No_____

12. Was Dr. Thomas Osdene's primary role at Philip Morris to develop information to contradict or provide controversy to the established fact that smoking causes lung cancer and other diseases?

Yes_____ No_____

13. Was Dr. Denoble's research or nicotine addiction terminated by Philip Morris because Philip Morris would not engage in internal research that could be damaging to Philip Morris in smoking and health litigation in the United States?

Yes_____ No_____

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14. Did the member Defendant Tobacco Companies form the Council for Tobacco Research (formerly the Tobacco Industry Research Committee) as a public relations sham, to create and perpetuate a false controversy as to whether smoking is hazardous to health and whether smoking causes lung cancer?

Yes_____ No_____

15. Have the member Defendant Tobacco Companies, through the Defendant Tobacco Institute, misrepresented research data relating to the hazards of smoking cigarettes so as to give smokers and the public a false sense of security and to mislead and confuse the public on smoking and health issues?

Yes_____ No_____

16. Did one or more of the Tobacco Companies misrepresent the amount of tar and nicotine on cigarette packages, knowing that the true yield of nicotine and tar may be far greater than that disclosed, depending upon how cigarettes are smoked?

Yes_____ No_____

17. Have one or more of the Tobacco Companies intentionally manipulated the levels of nicotine in low tar cigarettes so as to artificially raise the nicotine levels?

Yes_____ No_____

18. Did one or more of the Tobacco Companies design a filter with tiny, nearly invisible holes with the intention that far less tar and nicotine would be measured through conventional measuring mechanisms, than is actually received in the lungs of smokers?

Yes_____ No_____

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19. Did one or more of the Tobacco Companies intentionally miscalculate and inaccurately measure levels of tar and nicotine in cigarettes so as to understate same and deceive the smoking public?

Yes_____ No_____

20. Did one or more of the Tobacco Companies, either individually or through the Tobacco Institute or the Council for Tobacco Research, through advertising, promotion and other public communications, misrepresent facts to the public, by stating that smoking is not injurious to health and that nicotine is not addictive?

Yes_____ No_____

21. Have one or more of the Tobacco Companies known for decades that the overwhelming majority of adult smokers first begin smoking while underage and in their teenage years and that the large majority of long term and life long customers of cigarette manufacturers became addicted to nicotine as underage teenagers?

Yes_____ No_____

22. Have one or more Defendant Tobacco Companies willfully and consciously marketed cigarettes to underage teenagers?

Yes_____ No_____

23. Have one or more of the Tobacco Companies over the course of decades avoided, concealed, suppressed and failed to disclose information known to it concerning the addictive and harmful properties of its product, cigarettes?

Yes_____ No_____

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24. Have one or more of the Tobacco Companies affirmatively misled the American public by advertising that there is a genuine and legitimate controversy in the scientific community on the subject of smoking and health, when in fact there is no such controversy?

Yes_____ No_____

25. Do the Tobacco Companies assert the public position today that cigarette smoking has not been proven to cause lung cancer, although the Surgeon Generals of the United States and every medical and scientific organization of repute in the United States has declared to the contrary?

Yes_____ No_____

26. Have Defendants Philip Morris, R.J. Reynolds, Brown & Williamson, American Tobacco and Lorillard intentionally violated the representations and promises they made to the American Public and smokers in the Frank Statement, published in 1954, in conscious disregard of public health and safety?

Yes_____ No_____

27. Has the Tobacco Industry spent billions of dollars to hide, cover up and obscure the fact that smoking causes disease and nicotine is addictive?

Yes_____ No_____

28. Has the Council for Tobacco Research (CTR), formerly the Tobacco Industry Research Committee (TIRC), issued many press releases and published articles authored by representatives at CTR – challenging the fact that smoking causes lung cancer and other diseases, since the inception of CTR/TIRC in 1954?

Yes_____ No_____

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29. Has the Council for Tobacco Research intentionally ignored and not disclosed or published to the public at large through press releases, articles or interviews, any data or scientific research conducted through grants by CTR, that supports the fact that smoking causes disease and nicotine is addictive?

Yes_____ No_____

30. Did R.J. Reynolds Tobacco Company intentionally target underage smokers and pre smokers with its "Joe Camel" advertising and promotional campaign?

Yes_____ No_____

31. Do over 80% of lifelong smokers become addicted to smoking while underage smokers?

Yes_____ No_____

32. Have one or more of the Tobacco Companies, the Tobacco Institute and/or the Council for Tobacco Research ignored, manipulated and/or distorted scientific and medical data linking smoking with disease, for the Tobacco Industry's pecuniary gain?

Yes_____ No_____

33. Have one or more of the Defendant Tobacco Companies intentionally manipulated the levels of nicotine in cigarettes so that the public will continue smoking?

Yes_____ No_____

34. Did one or more of the Defendant Tobacco Companies published tobacco advertising that is false or misleading?

Yes_____ No_____

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35. Did one or more of the Tobacco Companies, the Tobacco Institute or the Council for Tobacco Research suppress and conceal information about the addictive nature of nicotine, while at the same time knowing that tobacco companies were intentionally manipulating levels of nicotine so as to keep smokers smoking?

Yes_____ No_____

36. Have one or more of the Tobacco Companies, the Tobacco Institute or the Council for Tobacco Research taken the public position that smoking is not a cause of lung cancer or other diseases and that smoking is not addictive – with full knowledge that cigarettes are addictive and that smoking cigarettes has caused an epidemic of deaths and disease to millions of Americans as well as people throughout the world?

Yes_____ No_____

37. Have one or more of the Tobacco Companies encouraged smokers to switch to low tar cigarettes, through implicit health claims in advertisements, knowing that low tar cigarettes are not safer since smokers will compensate for the reduced nicotine by smoking more cigarettes?

Yes_____ No_____

38. Do one or more of the Tobacco Companies intentionally target the most susceptible and vulnerable individuals as new smokers, including underage adolescents, women, minorities and members of our armed forces during times of combat?

Yes_____ No_____

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ISSUES ON CIVIL CONSPIRACY

1. Did two or more of the Defendants agree to develop a public relations strategy to refute, undermine and neutralize information coming from the scientific and medical communities within the United States, so as to confuse and mislead the public?

Yes_____ No_____

2. Have two or more Defendants agreed to hide and conceal scientific data establishing that nicotine is addictive and that smoking cigarettes causes lung cancer and other diseases?

Yes_____ No_____

3. Did two or more of the Defendants agree to suppress and conceal scientific data and research through the Special Projects Division of the Council for Tobacco Research?

Yes_____ No_____

4. Have two or more of the Defendants agreed to spend billions of dollars yearly to entice new smokers, targeting underage smokers, women and minorities to make up for the smokers who are dying or who have been able to quit?

Yes_____ No_____

5. Have two or more of the Defendants agreed to intentionally miscalculate and inaccurately measure the levels of tar and nicotine in cigarettes so as to understate those measurements and deceive the smoking public?

Yes_____ No_____

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6. Have two or more of the Defendants conspired to misrepresent to the public, that there is a legitimate controversy as to whether smoking cigarettes causes lung cancer and other diseases – with full knowledge that the opposite is true and there is no legitimate controversy within the medical and scientific communities?

Yes_____ No_____

7. Have two or more of the Defendants agreed to misrepresent to the public at large and members of Congress on March 25, 1994 and April 14, 1994, by stating under oath that nicotine is not addictive and cigarettes do not cause any diseases or deaths?

Yes_____ No_____

8. Have two or more Defendants agreed to mislead the American public and the United States Government by falsely stating that the tobacco companies only advertise and promote cigarettes to encourage brand switching and never to entice non smokers or pre-smokers to smoke cigarettes?

Yes_____ No_____

9. Have two or more of the Defendants agreed, through the Special Projects Division of the Council for Tobacco Research, to conceal scientific research and utilize CTR to obtain litigation witnesses and evidence for use in litigation filed by smokers against CTR member Defendant Tobacco Companies?

Yes_____ No_____

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10. Did the Defendant Tobacco Companies develop a Literature Retrieval Division in the Council for Tobacco Research, that contained an extensive world wide library of smoking and health research, that was not made available to scientists at the Council for Tobacco Research or scientists at any of the Defendant Tobacco Companies – and was only made available to lawyers working for the Defendant Tobacco Companies for use in defending Defendant Tobacco Companies against claims by smokers with disease?

Yes_____ No_____

11. Have two or more of the Defendants agreed to misrepresent data to the public so as to convince smokers and the public that there is a controversy as to whether smoking cigarettes causes lung cancer, and that nicotine is not addictive?

Yes_____ No_____

12. Did two or more of the Defendants agree to form the Council for Tobacco Research as a public relations "front" to defend the tobacco companies in public forums, reassure smokers, to defend the member companies in litigation filed by smokers, and to perpetuate a false controversy as to whether smoking is hazardous to health and causes lung cancer and other diseases?

Yes_____ No_____

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13. Did the Tobacco Institute, on behalf of and at the direction of its member Defendant Tobacco Companies since 1957 through the present time, produce and publish numerous booklets, pamphlets, press releases, advertisements, publications, videos and other materials disseminated to the public at large, that contain misrepresentations, half-truths and conceal material facts on the issues of smoking and health, marketing to underage youth, and the addictiveness or dependence producing effects of cigarettes with nicotine?

Yes_____ No_____

14. Did the Tobacco Institute, on behalf of and at the direction of its member Defendant Tobacco Companies engage in a series of speeches, interviews and other oral presentations to the public at large, including smokers, that misrepresented the smoking and health issues and presented a false controversy, to confuse smokers and encourage smokers to continue smoking?

Yes_____ No_____

15. Did two or more of the Defendants agree to a "party line" that cigarettes are not a cause of lung cancer unless and until the "mechanism" is known, fully recognizing that that would be almost an impossible standard to meet, requiring 100% proof, thus perpetuating a false controversy as to whether smoking causes lung cancer and other diseases?

Yes_____ No_____

16. Did two or more of the Defendants agree to perpetuate a false controversy and confuse the smoking public, through their economic influence?

Yes_____ No_____

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APPENDIX E

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION
Case No. 94-08273 CA (22)

HOWARD A. ENGLE, M.D., et al.,

Plaintiffs,

vs.

R.J. REYNOLDS TOBACCO COMPANY, et al.,

Defendants.

THE ORIGINAL FILED
ON JUN 14 1999
IN THE OFFICE OF
CIRCUIT COURT DADE CO. FL

CERTAIN DEFENDANTS'[1] OBJECTIONS TO PLAINTIFFS' PROPOSED FRAUD, MISREPRESENTATION AND CIVIL CONSPIRACY QUESTIONS

[1] These objections are filed on behalf of all defendants except Liggett Group, Inc., and Brooke Group Ltd., Inc. In filing these objections, defendants do not waive any arguments made previously in evidentiary objections, summary judgment motions, directed verdict motions and motions to decertify.

BEST AVAILABLE COPY

I. ISSUES ON FRAUD AND MISREPRESENTATION

A. GENERAL OBJECTIONS

1. Defendants object to any questions pertaining to allegedly fraudulent conduct occurring prior to May 5, 1982, or any product sold prior to 1974.

2. Defendants object on preemption grounds to any questions pertaining to defendants' alleged failure after July 1, 1969 to provide more information regarding the health effects of smoking.

B. SPECIFIC OBJECTIONS

1. Did one or more of the Defendant Tobacco Companies manipulate the levels of nicotine in cigarettes?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **"Manipulate," by itself, is vague, irrelevant, argumentative, and not probative of any actionable conduct**
- **Lack of specificity (which companies? which brands? when?) renders any answer useless for Phases 2 or 3**
- **Duplicative of Fraud questions 17, 33, and 35**

2. Did one or more of the Defendants conceal from the public and the United States government, internal research establishing that nicotine is addictive?

DEFENDANTS' OBJECTIONS:

- **Concealment is not a cause of action in this case under Florida law**
- **Vague as to time; if post-1969, runs afoul of preemption**
- **Lack of specificity renders any answer useless for Phases 2 or 3**
- **Argumentative and assumes that internal research establishes that nicotine is addictive; would put Court in position of commenting on evidence**
- **Lack of materiality – concealing information otherwise known to the public cannot be actionable**
- **Irrelevant – neither "the public" nor "the United States government" are parties**

3. Has the Council for Tobacco Research served as a public relations front for the member Defendant Tobacco Companies?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **Irrelevant**
- **"Public relations front" is argumentative**
- **Lack of specificity renders any answer useless for Phases 2 or 3**
- **Duplicative of Fraud question 14**

4. Have one or more of the Defendants, either individually, in concert, or through the Council for Tobacco Research or the Tobacco Institute, misled the public by asserting that there is a legitimate controversy as to whether smoking cigarettes causes lung cancer and other diseases – with full knowledge that there is no controversy and smoking does cause lung cancer and other diseases?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact; instead, would be a non-actionable statement of opinion**
- **Not a common, class issue**
- **Vague (and devoid of evidence) in asking whether Defendants acted "through" CTR or the Tobacco Institute**
- **Argumentative and assumes "that there is no controversy and smoking does cause lung cancer and other diseases" – would put Court in position of commenting on evidence**
- **Lack of specificity (which companies? when?) renders any answer useless for Phases 2 or 3**
- **Irrelevant – "the public" is not a party**
- **Duplicative of Fraud questions 24 and 36**

5. Did the Chief Executive Officers from each of the Defendant Tobacco Companies falsely state the following before the Congress:

a) Smoking cigarettes does not cause lung cancer?

b) Nicotine is not addictive?

c) It is unknown whether any person has ever died from smoking cigarettes?

DEFENDANTS' OBJECTIONS:

- **No evidence to justify even asking this question; actual testimony is not in evidence and, indeed, the testimony was not as characterized by this misleading question**
- **The language "falsely state" is not adequate in terms of the state of mind required to be actionable under Florida law**
- **First Amendment/Noerr-Pennington/privilege**
- **Not a misstatement of fact; instead, would be a non-actionable statement of opinion**
- **Lack of materiality – Congressional testimony was only one month before this case was filed; no class member could have relied on such testimony and been injured within that one-month period**
- **Compound**
- **Not a common, class issue**

6. Did one or more of the Defendant Tobacco Companies intentionally target underage teenagers and children through expansive advertising and promotional campaigns, while claiming the opposite – that the Defendant Tobacco Companies do not market or advertise to underage smokers and do their best to discourage underage smokers?

DEFENDANTS' OBJECTIONS:

- **Not a common, class issue.**
- **Irrelevant to any cause of action – Court permitted targeting evidence in case only for credibility issue**
- **The alleged "fraud," if that is what it is, is nonsensical. What smoker would decide to smoke (or keep smoking) because the companies deny youth marketing?**
- **Argumentative and inflammatory**
- **Compound**
- **Duplicative of Fraud questions 22, 30, and 38**
- **Vague as to time; if post-1969, runs afoul of preemption**
- **The term "expansive" is vague and irrelevant**

9. Was Dr. Frederick Homburger, a grantee of the Council for Tobacco Research, pressured by representatives of the Defendant Tobacco Companies and the Defendant Council for Tobacco Research, to change his scientific findings so as to not reveal that smoking causes cancer of the larynx in hamsters?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **Concealment is not actionable in this case under Florida law**
- **Preemption**
- **Assumes that smoking causes laryngeal cancer in hamsters – would put Court in position of commenting on evidence**
- **Lack of specificity renders any answer useless for Phases 2 or 3**
- **Evidence showed that Dr. Homburger's research findings were published and were NOT changed - thus, no harm to class occurred**

10. Did Philip Morris prohibit its scientists from conducting safety testing on Philip Morris' commercial cigarettes and those of other Defendant tobacco companies because such testing was to be done solely overseas, where negative results would not be available to Plaintiffs in smoking and health litigation within the United States?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **Lack of specificity (e.g., dates) renders any answer useless for Phases 2 or 3**
- **"Safety testing" is vague**
- **Argumentative and assumes (incorrectly) that "negative results" overseas "would not be available to Plaintiffs" – puts Court in position of commenting on evidence**

11. Did Philip Morris not permit animal testing within Philip Morris' facilities in the United States, but only in Europe where negative results would not be discoverable in U.S. litigation?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **"Animal testing" is vague**
- **Lack of specificity (e.g., dates) renders any answer useless for Phases 2 or 3**
- **Argumentative and assumes (incorrectly) that "negative results" overseas "would not be discoverable" – puts Court in position of commenting on evidence**

12. Was Dr. Thomas Osdene's primary role at Philip Morris to develop information to contradict or provide controversy to the established fact that smoking causes lung cancer and other diseases?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **Irrelevant**
- **Lack of specificity (e.g., dates) renders any answer useless for Phases 2 or 3**
- **Argumentative and assumes "the established fact that smoking causes lung cancer and other diseases" – puts Court in position of commenting on evidence**

13. Was Dr. DeNoble's research on nicotine addiction terminated by Philip Morris because Philip Morris would not engage in internal research that could be damaging to Philip Morris in smoking and health litigation in the United States?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **Irrelevant**
- **Assumes "nicotine addiction" – puts Court in position of commenting on evidence**

14. Did the member Defendant Tobacco Companies form the Council for Tobacco Research (formerly the Tobacco Industry Research Committee) as a public relations sham, to create and perpetuate a false controversy as to whether smoking is hazardous to health and whether smoking causes lung cancer?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **Statute of repose**
- **Argumentative ("public relations sham," and "false controversy")**
- **Duplicative of Fraud question 3**

15. Have the member Defendant Tobacco Companies, through the Defendant Tobacco Institute, misrepresented research data relating to the hazards of smoking cigarettes so as to give smokers and the public a false sense of security and to mislead and confuse the public on smoking and health issues?

DEFENDANTS' OBJECTIONS:

- **Not a common, class issue**
- **Lack of specificity renders any answer to this question useless for Phases 2 or 3**
- **Compound, confusing, vague, and argumentative –What data? What hazards? How "misrepresented"? What "false sense of security"?**
- **To "mislead and confuse" is not the standard for actionable conduct in this case under Florida law**
- **Compound**
- **There must be intent to deceive.**
- **Irrelevant – the issue really is whether the Tobacco Institute intentionally made any false statement of FACT, and unless that false statement of fact is specified in terms of substance and time (the fraud-with-specificity requirements that have <u>never</u> been met in this case) this question is useless**
- **Irrelevant - "the public" is not a party**
- **Duplicative of Fraud questions 20 and 23**

16. Did one or more of the Tobacco Companies misrepresent the amount of tar and nicotine on cigarette packages, knowing that the true yield of nicotine and tar may be far greater than that disclosed, depending upon how cigarettes are smoked?

DEFENDANTS' OBJECTIONS:

- **FTC requirement as to how tar and nicotine levels are reported**
- **Preemption**
- **Not a material issue for the entire class – not all smokers wanted to smoke low tar or low nicotine products**
- **Irrelevant**
- **Vague – how "misrepresent"?**
- **Lack of specificity (which companies? which brands? when?) renders any answer useless for Phases 2 or 3**
- **Duplicative of Fraud question 19**

17. Have one or more of the Tobacco Companies intentionally manipulated the levels of nicotine in low tar cigarettes so as to artificially raise the nicotine levels?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **Lack of specificity (which companies? which brands? when?) renders any answer useless for Phases 2 or 3**
- **"Manipulated" is vague, irrelevant, and argumentative**
- **Irrelevant – no evidence this occurred with respect to any cigarette sold to public**
- **Duplicative of Fraud questions 1, 33, and 35**

18. Did one or more of the Tobacco Companies design a filter with tiny, nearly invisible holes with the intention that far less tar and nicotine would be measured through conventional measuring mechanisms, than is actually received in the lungs of smokers?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **Lack of specificity (which companies? which brands? when?) renders any answer useless for Phases 2 or 3**
- **Argumentative**
- **Refuted by Farone's testimony**

19. Did one or more of the Tobacco Companies intentionally miscalculate and inaccurately measure levels of tar and nicotine in cigarettes so as to understate same and deceive the smoking public?

DEFENDANTS' OBJECTIONS:

- **FTC requirement as to how tar and nicotine levels are reported**
- **Preemption**
- **Misleading – there was no evidence that Defendants' tar and nicotine numbers are not the same as the actual FTC test results**
- **Irrelevant –the "smoking public" is not a party**
- **Not a material issue for the entire class – not all smokers wanted to smoke low tar or low nicotine products**
- **Lack of specificity (which companies? which brands? when?) renders any answer useless for Phases 2 or 3**
- **Duplicative of Fraud question 16**

20. Did one or more of the Tobacco Companies, either individually or through the Tobacco Institute or the Council for Tobacco Research, through advertising, promotion and other public communications, misrepresent facts to the public, by stating that smoking is not injurious to health and that nicotine is not addictive?

DEFENDANTS' OBJECTIONS:

- **Not a common, class issue**
- **Lack of specificity (which companies? which brands? when?) renders any answer useless for Phases 2 or 3**
- **Irrelevant – "the public" is not a party**
- **Compound**
- **No evidence in the record to justify even asking this question. In "The Frank Statement," the authors said that they "believe[d]" the products they made were not injurious to health – that is a non-actionable statement of opinion, not fact**
- **Duplicative of Fraud questions 15 and 23**

21. Have one or more of the Tobacco Companies known for decades that the overwhelming majority of adult smokers first begin smoking while underage and in their teenage years and the large majority of long term and life long customers of cigarette manufacturers became addicted to nicotine as to underage teenagers?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **Not a common, class issue.**
- **Argumentative; assumes as a fact that smokers start as youths and become "addicted" – puts the Court in position of commenting on evidence**
- **Irrelevant to any cause of action**
- **Lack of specificity (which companies? when?) renders any answer useless for Phases 2 or 3**
- **Vague to the point of being useless for Phases 2 or 3 – known for "decades"? "Overwhelming" or "large" majority?**

22. Have one or more Defendant Tobacco Companies willfully and consciously marketed cigarettes to underage teenagers?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **Court permitted this issue to come into the case only with respect to credibility**
- **Not a common, class issue**
- **Irrelevant to any cause of action**
- **Duplicative of Fraud questions 6 and 38**
- **The language "willfully and consciously" is not relevant to the intent required under Florida law**
- **Vague as to time; if post-1969, runs afoul of preemption**
- **Lack of specificity (which companies? which brands? when?) renders any answer useless for Phases 2 or 3**

23. Have one or more of the Tobacco Companies over the course of decades avoided, concealed, suppressed and failed to disclose information known to it concerning the addictive and harmful properties of its product, cigarettes?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **The language "avoided, concealed, suppressed and failed to disclose" is not the standard for actionable conduct in this case under Florida law**
- **Compound**
- **Vague as to time; if post-1969, runs afoul of preemption**
- **Argumentative and assumes "the addictive and harmful properties" of cigarettes – would put the Court in position of commenting on evidence**
- **Lack of specificity (which companies? when?) renders any answer useless for Phases 2 or 3**
- **Duplicative of Fraud questions 15 and 20**

24. Have one or more of the Tobacco Companies affirmatively misled the American public by advertising that there is a genuine and legitimate controversy in the scientific community on the subject of smoking and health, when in fact there is no such controversy?

DEFENDANTS' OBJECTIONS:

- **Duplicative of Fraud questions 4 and 36, and subject to the same objections**
- **Not an actionable misrepresentation of fact; instead, would be a non-actionable statement of opinion**
- **Not a common, class issue**
- **Lack of specificity (which companies? when?) renders any answer useless for Phases 2 or 3**
- **Irrelevant – the "American public" is not a party**
- **Argumentative and assumes that "in fact there is no such controversy" – would put Court in position of commenting on evidence**

25. Do the Tobacco Companies assert the public position today that cigarette smoking has not been proven to cause lung cancer, although the Surgeon Generals of the United States and every medical and scientific organization of repute in the United States has declared to the contrary?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **Position "today" is irrelevant to any cause of action in this case**
- **Argumentative and assumes conclusion that "every medical and scientific organization of repute" has concluded that cigarettes have been proved to cause lung cancer – puts Court in position of commenting on evidence**

26. Have Defendants Philip Morris, R.J. Reynolds, Brown & Williamson, American Tobacco and Lorillard intentionally violated the representations and promises they made to the American Public and smokers in the Frank Statement, published in 1954, in conscious disregard of public health and safety?

DEFENDANTS' OBJECTIONS:

- **Failure to carry out a promise is not a fraud unless, at the time of the promise, there was no intention to carry out the promise**
- **Irrelevant – "the American public" and "public health and safety" are not at issue**
- **Vagueness and lack of specificity as to "the representations and promises"**
- **Argumentative**

27. Has the Tobacco Industry spent billions of dollars to hide, cover up and obscure the fact that smoking causes disease and nicotine is addictive?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **The "Tobacco Industry" is not a party**
- **To "hide, cover up and obscure" is not the standard for actionable conduct in this case under Florida law**
- **Expenditures are irrelevant**
- **Argumentative and inflammatory**
- **Assumes "the fact that smoking causes disease and nicotine is addictive" – would put Court in position of commenting on evidence**
- **Vague as to time; if post-1969, runs afoul of preemption**
- **Lack of specificity renders any answer useless for Phases 2 or 3**
- **Duplicative of Fraud questions 7, 20, and 23**

28. Has the Council for tobacco Research (CTR), formerly the Tobacco Industry Research Committee (TIRC), issued many press releases and published articles authored by representatives at CTR – challenging the fact that smoking causes lung cancer and other diseases, since the inception of CTR/TIRC in 1954?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **Lack of specificity (which "press releases and published articles"?) renders any answer useless for Phases 2 or 3**
- **Argumentative and assumes "the fact that smoking causes lung cancer and other diseases" – would put Court in position of commenting on evidence**
- **Irrelevant – commercial speech is protected by First Amendment**

29. Has the Council for Tobacco Research intentionally ignored and not disclosed or published to the public at large through press releases, articles or interviews, any data or scientific research conducted through grants by CTR, that supports the fact that smoking causes disease and nicotine is addictive?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **To "intentionally ignore[] and not disclose[] or publish[]" is not the standard for actionable conduct in this case under Florida law**
- **Argumentative and assumes CTR had duty to issue press releases, etc. - puts Court in position of commenting on evidence**
- **Argumentative and assumes "the fact that smoking causes disease and nicotine is addictive" – puts Court in position of commenting on evidence**
- **Lack of specificity renders any answer useless for Phases 2 or 3**

30. Did R.J. Reynolds Tobacco Company intentionally target underage smokers and pre smokers with its "Joe Camel" advertising and promotional campaign?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **Not a common, class issue**
- **Vague as to "pre-smokers"**
- **Duplicative of questions 6, 22, and 38**
- **Irrelevant to any cause of action**
- **Court permitted this issue to come into the case only with respect to credibility**
- **Preemption**

31. Do over 80% of lifelong smokers become addicted to smoking while underage smokers?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **Not a common, class issue.**
- **Irrelevant to any cause of action**
- **Argumentative**

32. Have one or more of the Tobacco Companies, the Tobacco Institute and/or the Council for Tobacco Research ignored, manipulated and/or distorted scientific and medical data linking smoking with disease, for the Tobacco Industry's pecuniary gain?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **To "ignore[], manipulate[] and/or distort[]" is vague and not the standard for actionable conduct in this case under Florida law**
- **Compound**
- **The "Tobacco Industry" is not a party**
- **Irrelevant to any cause of action**
- **Argumentative – "pecuniary gain" is inflammatory**
- **Lack of specificity (which companies? when?) renders any answer useless for Phases 2 or 3**

33. Have one or more of the Defendant Tobacco Companies intentionally manipulated the levels of nicotine in cigarettes so that the public will continue smoking?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **Lack of specificity (which companies? which brands? when?) renders any answer useless for Phases 2 or 3**
- **Irrelevant – "the public" is not a party**
- **Duplicative of Fraud questions 1, 17, and 35**

34. Did one or more of the Defendant Tobacco Companies published [sic] tobacco advertising that is false or misleading?

DEFENDANTS' OBJECTIONS:

- **Lack of specificity (which companies? which brands? when?) renders any answer useless for Phases 2 or 3**
- **"Misleading" is not actionable**
- **Requires fraudulent intent**
- **Vague as to time; if post-1969, runs afoul of preemption**

35. Did one or more of the Tobacco Companies, the Tobacco Institute or the Council for Tobacco Research suppress and conceal information about the addictive nature of nicotine, while at the same time knowing that tobacco companies were intentionally manipulating levels of nicotine so as to keep smokers smoking?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **To "suppress and conceal" is not the standard for actionable conduct in this case under Florida law**
- **Vague as to time; if post-1969, runs afoul of preemption**
- **Lack of specificity (which companies? when?) renders any answer useless for Phases 2 or 3**
- **Compound nature of the question makes it argumentative**
- **Assumes "addictive nature of nicotine" and nicotine manipulation – puts Court in position of commenting on evidence**
- **Duplicative of Fraud questions 1, 17, and 33**

36. Have one or more of the Tobacco Companies, the Tobacco Institute or the Council for Tobacco Research taken the public position that smoking is not a cause of lung cancer or other diseases and that smoking is not addictive – with full knowledge that cigarettes are addictive and that smoking cigarettes has caused an epidemic of deaths and disease to millions of Americans as well as people throughout the world?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **Argumentative – "epidemic of deaths and disease to millions of Americans as well as people throughout the world" is inflammatory – puts Court in position of commenting on evidence**
- **Irrelevant to this class whether "millions of Americans as well as people throughout the world" were harmed**
- **No evidence that any Defendant made a factual statement that "smoking is not a cause of lung cancer or other diseases"**
- **Lack of specificity renders any answer useless for Phases 2 or 3**
- **Duplicative of Fraud questions 2, 4, 20, 23, 24, 27, and 32**

37. Have one or more of the Tobacco Companies encouraged smokers to switch to low tar cigarettes, through implicit health claims in advertisements, knowing that low tar cigarettes are not safer since smokers will compensate for the reduced nicotine by smoking more cigarettes?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **Lack of specificity renders any answer useless for Phases 2 or 3**
- **"Encouraged" is vague**
- **"[I]mplicit health claims" do not constitute an actionable misrepresentation under Florida law**
- **Lack of specificity (which companies? which brands? when?) renders any answer useless for Phases 2 or 3**
- **Preemption**
- **Argumentative and assumes that "smokers will compensate" – puts Court in position of commenting on evidence**
- **Duplicative of Fraud questions 16, 19, 20, 23, 27, 32, and 36**

38. Do one or more of the Tobacco Companies intentionally target the most susceptible and vulnerable individuals as new smokers, including underage adolescents, women, minorities and members of our armed forces during times of combat?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **Not a common, class issue**
- **Lack of specificity (which companies? which brands? when?) renders any answer useless for Phases 2 or 3**
- **Court permitted this issue to come into the case to show credibility, not fraud**
- **Argumentative, inflammatory questions**
- **Duplicative of Fraud questions 6 and 22**
- **Irrelevant to any cause of action**
- **Argumentative and assumes without evidence that certain groups are "susceptible and vulnerable" – puts Court in position of commenting on evidence**
- **No evidence to justify even asking question about armed forces**

II. ISSUES ON CIVIL CONSPIRACY

A. GENERAL OBJECTIONS

1. Defendants object to any questions pertaining to allegedly fraudulent conduct occurring prior to May 5, 1982, or any product sold prior to 1974.

2. Defendants object on preemption grounds to any questions pertaining to defendants' alleged failure after July 1, 1969 to provide more information regarding the health effects of smoking.

3. Defendants object to any conspiracy questions that do not specify the alleged unlawful act or unlawful means allegedly agreed upon by the parties to the conspiracy.

B. SPECIFIC OBJECTIONS

1. Did two or more of the Defendants agree to develop a public relations strategy to refute, undermine and neutralize information coming from the scientific and medical communities within the United States, so as to confuse and mislead the public?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **Irrelevant - public relations and the confusion or misleading of "the public" is not an issue in this case**
- **To "neutralize" clearly implicates preemption**
- **Compound and confusing**
- **Duplicative of Conspiracy question 12**
- **Lack of overt act**
- **Lack of specificity as to time and parties to the alleged agreement**

2. Have two or more Defendants agreed to hide and conceal scientific data establishing that nicotine is addictive and that smoking cigarettes causes lung cancer and other diseases?

DEFENDANTS' OBJECTIONS:

- **Irrelevant – to "hide and conceal" is not the standard for actionable conduct in this case under Florida law**
- **Lack of overt act**
- **Lack of specificity as to time and parties to the alleged agreement**
- **Merely a reformulation of Fraud questions 20, 23, 27, 32, and 36, and subject to the same objections**
- **Argumentative and assumes "data establishing that nicotine is addictive" – puts Court in position of commenting on evidence**
- **No evidence to justify even asking this question**

3. Did two or more of the Defendants agree to suppress and conceal scientific data and research through the Special Projects Division of the Council for Tobacco Research?

DEFENDANTS' OBJECTIONS:

- **Irrelevant – to "suppress and conceal" is not the standard for actionable conduct in this case under Florida law**
- **No evidence to justify even asking this question**
- **Lack of overt act**
- **Lack of specificity as to time and parties to the alleged agreement**
- **Duplicative of Conspiracy question 9**

4. Have two or more of the Defendants agreed to spend billions of dollars yearly to entice new smokers, targeting underage smokers, women and minorities to make up for the smokers who are dying or who have been able to quit?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **Expenditures are irrelevant**
- **Preemption**
- **Argumentative and assumes need "to make up for the smokers who are dying or who have been unable to quit" – puts Court in position of commenting on evidence**
- **No evidence to justify even asking this question**
- **Lack of overt act**
- **No underlying tort**
- **Merely a reformulation of Fraud question 38, and subject to the same objections**
- **Lack of specificity as to time and parties to the alleged agreement**

5. Have two or more of the Defendants agreed to intentionally miscalculate and inaccurately measure the levels of tar and nicotine in cigarettes so as to understate those measurements and deceive the smoking public?

DEFENDANTS' OBJECTIONS:

- **Irrelevant – "the smoking public" is not a party**
- **Preemption**
- **FTC requirement as to how tar and nicotine levels are reported**
- **Merely a reformulation of Fraud question 19, and subject to the same objections**
- **No evidence to justify even asking this question**
- **Lack of overt act**
- **Lack of specificity as to time and parties to the alleged agreement**

6. Have two or more of the Defendants conspired to misrepresent to the public, that there is a legitimate controversy as to whether smoking cigarettes causes lung cancer and other diseases – with full knowledge that the opposite is true and there is no legitimate controversy within the medical and scientific communities?

DEFENDANTS' OBJECTIONS:

- **Irrelevant and argumentative**
- **"The public" is not a party**
- **Assumes "that the opposite is true and there is no legitimate controversy within the medical and scientific communities" – puts Court in position of commenting on evidence**
- **No evidence to justify even asking this question**
- **Duplicative of Conspiracy question 11**
- **Merely reformulates Fraud questions 2, 20, 23, 27, 32, and 36, and subject to the same objections**
- **Lack of overt act**
- **Lack of specificity as to time and parties to the alleged agreement**

7. Have two or more of the Defendants agreed to misrepresent to the public at large and members of Congress on March 25, 1994 and April 14, 1994, by stating under oath that nicotine is not addictive and cigarettes do not cause any diseases or deaths?

DEFENDANTS' OBJECTIONS:

- **Irrelevant – "the public at large and members of Congress" are not parties**
- **No underlying tort - a statement of opinion is not actionable**
- **No evidence to justify even asking this question – in fact, misstates testimony**
- **First Amendment/Noerr-Pennington/privilege**
- **Lack of specificity as to time and parties to the alleged agreement**
- **Merely a reformulation of Fraud question 5, and subject to the same objections**

8. Have two or more Defendants agreed to mislead the American public and the United States Government by falsely stating that the tobacco companies only advertise and promote cigarettes to encourage brand switching and never to entice non smokers or pre-smokers to smoke cigarettes?

DEFENDANTS' OBJECTIONS:

- **Not an actionable misrepresentation of fact**
- **Irrelevant – no one could start smoking or refrain from quitting in reasonable reliance on advertising**
- **Irrelevant – "the American public and the United States Government" are not parties**
- **Misstates evidence – several witnesses also discussed advertising's effect on brand loyalty of existing consumers**
- **Argumentative and assumes that companies advertise to "entice" non-smokers – puts Court in position of commenting on evidence**
- **Preemption**
- **No underlying tort**
- **No evidence to justify even asking this question**
- **Lack of specificity as to time and parties to the alleged agreement**

9. Have two or more of the Defendants agreed, through the Special Projects Division of the Council for Tobacco Research, to conceal scientific research and utilize CTR to obtain litigation witnesses and evidence for use in litigation filed by smokers against CTR member Defendant Tobacco Companies?

DEFENDANTS' OBJECTIONS:

- **No actionable misrepresentation of fact**
- **Irrelevant – no one could start smoking or refrain from quitting in reasonable reliance on CTR Special Projects**
- **No underlying tort**
- **Lack of overt act**
- **Lack of specificity as to time and parties to the alleged agreement**
- **Duplicative of Conspiracy question 3**

10. Did the Defendant Tobacco Companies develop a Literature Retrieval Division in the Council for Tobacco Research, that contained an extensive world wide library of smoking and health research, that was not made available to scientists at the Council for Tobacco Research or scientists at any of the Defendant Tobacco Companies – and was only made available to lawyers working for the Defendant Tobacco Companies for use in defending Defendant Tobacco Companies against claims by smokers with disease?

DEFENDANTS' OBJECTIONS:

- **No actionable misrepresentation of fact**
- **Irrelevant – no smoker could conceivably have been injured by existence of Literature Retrieval Division of CTR**
- **Argumentative**
- **No underlying tort**
- **Does not even allege any agreement**

11. Have two or more of the Defendants agreed to misrepresent data to the public so as to convince smokers and the public that there is a controversy as to whether smoking cigarettes causes lung cancer, and that nicotine is not addictive?

DEFENDANTS' OBJECTIONS:

- **Lack of specificity as to time and parties to the alleged agreement**
- **Lack of overt act**
- **Irrelevant – "the public" is not a party**
- **Duplicative of Conspiracy question 6**
- **Merely reformulates Fraud questions 2, 20, 23, 27, 32, and 36, and subject to the same objections**
- **No evidence to justify even asking this question**

12. Did two or more of the Defendants agree to form the Council for Tobacco Research as a public relations "front" to defend the tobacco companies in public forums, reassure smokers, to defend the member companies in litigation filed by smokers, and to perpetuate a false controversy as to whether smoking is hazardous to health and causes lung cancer and other diseases?

DEFENDANTS' OBJECTIONS:

- **No actionable misrepresentation of fact**
- **Irrelevant – no smoker could have reasonably and detrimentally relied upon any CTR conduct**
- **No underlying tort**
- **Lack of overt act**
- **Argumentative and assumes existence of "false controversy" – puts Court in position of commenting on evidence**
- **Duplicative of Conspiracy question 1**
- **Merely reformulates Fraud questions 3 and 14, and subject to the same objections**
- **Lack of specificity as to time and parties to the alleged agreement**

13. Did the Tobacco Institute, on behalf of and at the direction of its member Defendant Tobacco Companies since 1957 through the present time, produce and publish numerous booklets, pamphlets, press releases, advertisements, publications, videos and other materials disseminated to the public at large, that contain misrepresentations, half-truths and conceal material facts on the issues of smoking and health, marketing to underage youth, and the addictiveness or dependence producing effects of cigarettes with nicotine?

DEFENDANTS' OBJECTIONS:

- **No actionable misrepresentation of fact**
- **Irrelevant – no evidence of a Tobacco Institute misstatement of FACT that any smoker could reasonably and detrimentally relied upon**
- **"Half-truths" is vague and argumentative**
- **Argumentative and assumes "marketing to underage youth, and the addictiveness or dependence producing effects of cigarettes with nicotine" – puts Court in position of commenting on evidence**
- **No underlying tort**
- **Compound**
- **No allegation of agreement**
- **Improper coupling of "addictiveness or dependence producing"**
- **Lack of specificity renders any answer to this question useless for Phases 2 or 3**

14. Did the Tobacco Institute, on behalf of and at the direction of its member Defendant Tobacco Companies engage in a series of speeches, interviews and other oral presentations to the public at large, including smokers, that misrepresented the smoking and health issues and presented a false controversy, to confuse smokers and encourage smokers to continue smoking?

DEFENDANTS' OBJECTIONS:

- **Irrelevant – no evidence of a Tobacco Institute misstatement of FACT that any smoker could reasonably and detrimentally relied upon**
- **Argumentative and assumes "false controversy" – puts Court in position of commenting on evidence**
- **No underlying tort**
- **No allegation of agreement**
- **Lack of specificity renders any answer to this question useless for Phases 2 or 3**

15. Did two or more of the Defendants agree to a "party line" that cigarettes are not a cause of lung cancer unless and until the "mechanism" is known, fully recognizing that that would be almost an impossible standard to meet, requiring 100% proof, thus perpetuating a false controversy as to whether smoking causes lung cancer and other diseases?

DEFENDANTS' OBJECTIONS:

- **Irrelevant**
- **No underlying tort – statement of opinion is not actionable**
- **Lack of overt act**
- **"Party line" is argumentative**
- **Argumentative and misleading to equate "mechanism" with "an impossible standard" of "100% proof" – puts Court in position of commenting on evidence**
- **Assumes "false controversy" – puts Court in position of commenting on evidence**
- **Lack of specificity as to time and parties to the alleged agreement**

16. Did two or more of the Defendants agree to perpetuate a false controversy and confuse the smoking public, through their economic influence?

DEFENDANTS' OBJECTIONS:

- **No actionable misrepresentation of fact**
- **Irrelevant – no evidence in this case that any smoker reasonably and detrimentally relied upon any misstatement of FACT based upon defendants' "economic influence"**
- **Irrelevant – "economic influence" prong of Florida conspiracy law is neither applicable nor pleaded here, and there has been no showing of "malicious motive" or "peculiar power of coercion," which are required in those rare cases involving conspiracy via "economic influence"**
- **Argumentative and unintelligible**
- **Assumes existence of "false controversy" – puts Court in position of commenting on evidence**
- **No underlying tort**
- **Lack of overt act**
- **Lack of specificity as to time and parties to the alleged agreement**

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WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by hand delivery to plaintiffs' counsel and to counsel for Liggett Group Inc., and Brooke Group Ltd. on this 14th day of June, 1999.

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APPENDIX F

RECORD MATERIALS RELATED TO PRESERVATION OF DUE PROCESS ISSUE

Brief in Opposition at 7: "Contrary to their position here, petitioners had previously proposed far more general questions for the Phase I verdict form than the questions of ultimate fact contained in the verdict form that was used. R.337[7]2-33811."

R.33784-33785: "[Certain Defendants'] Phase I, Stage I Issues For The Jury" (April 21, 1998) (emphasis added)

In accordance with the Court's Order on Trial Plan Issues, certain Defendants submit the following questions as the issues to be resolved in Phase I, Stage 1, of the Trial Plan Order. *These questions reflect the essence of the six common questions listed by Judge Solomon in the original Order of October 31, 1994, certifying the class.*

1. Has it been scientifically proven that smoking cigarettes can cause disease, including lung cancer, heart disease, and emphysema?

   Yes _____ No _____

2. A. Is the nicotine in tobacco addictive?

   Yes _____ No _____

   B. If "yes," are all smokers addicted to tobacco?

   Yes _____ No _____

   C. If you answer 2B, "yes," are some smokers able to quit?

   Yes _____ No _____

3. Prior to July 1, 1969, did Defendants conceal the results of scientific studies proving that smoking cigarettes causes diseases including lung cancer, heart

disease, and emphysema, which information was not otherwise known or available?

Yes _____ No _____

4. Has the level of nicotine in cigarettes been artificially maintained or manipulated by the Defendants so as to create an addiction in smokers and for the purpose of continuing that addiction?

Yes _____ No _____

5. Was the "Special Projects" division of the Council for Tobacco research established for the purpose of concealing medical research under he misuse of the attorney-client privilege?

Yes _____ No _____

6. Prior to July 1, 1969, did the Defendants have a duty to warn all members of the class that consumption of their product, cigarette, would cause addiction? Note that the existence of a duty to warn is a question of law for the Court, not the jury.

"Defendants Tentative Proposed Verdict" (June 5, 1998) (discussed at Hearing of June 5, 1998) (Excerpts)

JURY VERDICT FORM

5. Prior to July 1, 1969, did one or more Defendants conceal the results of scientific studies, not otherwise known or available, proving that smoking cigarettes can cause any of the diseases or medical conditions [found by the jury to have been scientifically proven to be caused by smoking]?

* * *

6. If your answer to question 5 is "yes" for any Defendant, *identify the scientific studies concealed by that Defendant and when such studies were concealed.*

7. . . . . Prior to July 1, 1969, did one or more Defendants conceal the results of scientific studies, not otherwise known or available, proving that cigarettes that contain nicotine are addictive?

* * *

8. If your answer to question 7 is "yes" for any Defendant, *identify the scientific studies concealed by that Defendant and when such studies were concealed.*

* * *

12. Did two or more Defendants agree together to conceal the results of scientific studies, not otherwise known or available, proving that smoking cigarettes can cause any of the diseases or medical conditions [found by the jury to have been scientifically proven to be caused by smoking]?

* * *

13. If your answer to question 12 is "yes" for any two or more Defendants, *identify when each of those Defendants agreed together and the scientific studies those Defendants agreed to conceal.*

14. Did two or more Defendants agree together to conceal the results of scientific studies not otherwise known or available proving that cigarettes containing nicotine are addictive?

* * *

15. If your answer to question 14 is "yes" for any two or more Defendants, *identify when each of those Defendants agreed together and the scientific studies those Defendants agreed to conceal.*]

R.35947-36007: Hearing (June 5, 1998) (emphasis added)

MR. HEIM: If I may, Judge, let me hand up the defendants' proposed [i.e., the June 5, 1998, proposal excerpted immediately above].

Now, as I said, Judge, originally what we gave Your Honor last time [i.e., the April 21, 1998, document, referenced above], were the questions modeled -- just the six questions -- in Judge Solomon's order.

I think probably the safest thing that we could do in terms of ensuring that we weren't going beyond what was necessary to do in the common issues phase of the trial, would be to use those six questions, since they have already been certified and approved. The Third DCA cited them with approval as being yes, these are common questions. We know they're individual issues, but these are common questions. That's why we used them.

But to try, after Your Honor said it would be helpful, to break these causes of action down, it then occurred to us to try to capture more from the causes of action that are up there, and capture more from the Complaint, the Amended Complaint in the case. That's what this proposed [June 5, 1998] jury verdict form does.

* * *

We also break down, as I think plaintiffs have with a number of the questions, to list the individual defendants. And we have placed into a number of the questions a time-period limitation to reflect the Court's preemption decision.

So our view is that Question Number 5, for example, has to be asked in terms of prior to July 1, 1969, because the Court's decision is that concealing the results of scientific studies is another way to say failing to warn about them, and that's preempted after July 1, 1969.

A number of our questions also require the jury to say when and what. Now, that's not the usual thing to ask juries to say when and what; but it is not without precedent. It is done frequently in the asbestos litigation when courts are trying to deal with across-the-board issues and they want the jury to give them findings that they can apply to more than one person.

So, breaking down and asking the jury to give time periods, and in some instances to say what, is done, and in this case would permit Your Honor to know and for all of us to know how to apply the finding of the jury.

So that is the approach of the defendants, which is basically to ask fact questions, don't ask causes of action,

and to get the jury where it's important to do so, to particularize the answer.

We think that by doing it that way, we will avoid choice-of-law issues, we will get questions that can be applied across the board, and then when we get to the Phase II individual representatives trial, the class representatives, people who are class representatives, and Phase III, the individual class members will have findings that will be meaningful and will have been worth the investing of these significant resources of Your Honor's time.

R.36226-36292: Hearing (June 12, 1998)

MR. HEIM [DEFENSE COUNSEL]: . . . . [W]hat is the difference between the way the plaintiffs have approached it [the Phase I verdict form] and the way the defendants have approached it [in the June 5, 1998, defense proposal excerpted above]? . . . I'm going to try to illustrate it with two points, and to do that I'm going to point to some of the plaintiffs' [proposed] questions and some of the defendants' [proposed] questions.

* * *

The [proposed] question the plaintiffs ask is, "Did the defendants make a false statement of fact?" Now, without a fair number of follow-up questions and clarifying questions, that statement, if the jury answers yes to that, it is of almost no value to the class. Almost no value to the class.

And the reason I say that, Judge, is that I know from the complaint and I know from the pretrial proceedings, the plaintiffs are going to offer evidence of lots of false statements, what they believe to be false statements of

facts. There's not going to be one; there's going to be a bunch of them.

* * *

So, if the jury answers that particular question yes, we won't know what false statement it was. And the people in the class who have to prove reliance on a false statement [in future trials before new juries] won't be able to know. We won't be able to tell whether they relied or not; they won't be able to say whether they relied or not because we won't know what it was.

* * *

So do you see the problem with that kind of situation, Judge, in terms of applying it across the board to the class when we get to Phase 3? There will be a finding; it will say the defendants made a false statement of fact; we'll get to that trial; whoever the trial judge is at that point will say: Okay, we know that the defendants made a false statement of fact; the individual plaintiff will present certain circumstances about when he or she started smoking, when he or she read things or heard things and nobody will know how that applies to whatever the false statement was or wasn't.

* * *

. . . . And the same thing applies when you ask – their [plaintiffs' proposed] Question 7 says: Was there negligence on the part of the defendants?" And if the jury answers that yes – let's say the jury comes back and answers that yes, but we don't know whether the negligence was a failure to test the product properly; a negligent inclusion of harmful ingredients; we don't know whether it's a negligent design; we don't know whether it's a negligent failure to warn. And depending upon what it is, it will affect different people in the class differently.

R. 48499-48563: "Certain Defendants' Preliminary Draft Phase I Trial Verdict Form" (June 4, 1999)

[Reproduced at Appendix B, *supra*]

T.35897 (June 10, 1999)

> MR. MOODHE [DEFENSE COUNSEL]: And once again, just in terms of specificity, we are dealing with a complaint that covers half a century or more of cigarette design and sale. Cigarettes didn't remain the same throughout that period of time. Knowledge about ways to design cigarettes was not the same throughout that period of time.
>
> And in order to effectively try in Phase II or III a strict liability claim, we need to know specifically what it is that either is defective or was a safer alternative design.
>
> And as I said before, that has been our approach [on the defendants' proposed verdict form], not just on this question [related to strict liability], but on all of the questions, to get information out of the jury process that can be imported and apply with some degree of specificity and intelligence to a class period that spans half a century.

R. 49142-49172: "Outline of Plaintiffs' Proposed Phase I Verdict Form Questions And Certain Defendants' Objections And Counter-Proposals Thereto" (June 14, 1999)

[Reproduced at Appendix C, *supra*]

Brief in Opposition at 7: "Although R.J. Reynolds Tobacco Company represented to the trial court that it was 'incumbent upon all of us' to provide additional 'enumerated' statements for a more detailed verdict form (T.35954), petitioners never did so."

T. 35953-35954 (June 11, 1999):

> MR. KIRBY [REYNOLDS COUNSEL]: Your Honor, consistent with the discussion that we had yesterday about the need for a verdict form in Phase I that we can carry into Phase II and Phase III, so that it has meaning, we believe that here has to be some degree of specificity.
>
> If you merely ask this jury whether the defendants made a misstatement of a material fact, and they are not required to identify what it is, when you go into the Phase II and Phase III trials of the individual smokers' claims, that finding will have no meaning.
>
> So we believe that, for it to have meaning going forward, it needs specificity.
>
> So how do we go about doing that?
>
> I think what is incumbent upon all of us is to identify what are the claimed misrepresentations of material fact; and if those are going to be enumerated, then so be it. But without doing that, for the life of me, I can't figure out what we do with a finding that some defendant at some time made some misstatement of fact.

Brief in Opposition at 7: "Petitioners also objected to a series of additional questions proposed by the class which were based on allegations in the amended complaint. R.49258-72."

T.35966-71 (June 11, 1999):

MR. HEIM [DEFENSE COUNSEL]: Your Honor, the only other thing I would mention here is plaintiffs handed up to Your Honor a whole bunch of questions [*see* Appendix D, *supra*] * * * I think – I just started reading them, and it occurred to me that many of them, by themselves are – would either not be actionable or make any sense.

THE COURT: I'll tell you what you do. You haven't read them, right?

MR. HEIM: I've looked at them.

THE COURT: But if you look at these questions –

MR. HEIM: We may want to comment on them.

THE COURT: If you want to agree with some of them and disagree with others, let me know.

MR. HEIM: If we want to comment on them, I'll let you know.

THE COURT: Some of the questions may be exactly what you have in mind as to specificity. I don't know.

MS. ROSENBLATT [PLAINTIFFS' COUNSEL]: Just for the record, we did provide those last week. It wasn't just this morning.

MR. HEIM: No, I understand that. But I'm saying that our view is that the approach we used was the correct approach. But I wanted to point out that some of those questions wouldn't make any sense, in any event.

But I can do that later in a separate submission [*see* Appendix E, *supra*].

R.49258-72: "Certain Defendants' Memorandum In Support Of Objections To Plaintiffs' Proposed Fraud, Misrepresentation and Civil Conspiracy Questions [*see* Appendix D, *supra*]" (June 14. 1999) (Excerpt)

> Plaintiffs, as the proponents of this purported class action and the party with the burden of proof, have the responsibility to provide this Court with proposed jury verdict questions which reflect the law and the answers to which can be usefully applied to the many Phase II and III trials. Plaintiffs' attempt fails utterly.
>
> ***
>
> Answers to the non-specific fraud and conspiracy questions proposed by plaintiffs [*see* Appendix D, *supra*] will be of no value in the individual trials of what plaintiffs allege to be a class consisting of hundreds of thousands of plaintiffs. It is simply not good enough to ask whether defendants made a misrepresentation on the subject of causation or addiction. The jury finding must identify the specific misrepresentation, how it was false, who made it, when and where. Only then can members try to prove reasonable and detrimental reliance on that misrepresentation in individual trials.

R.49296-49322: "Certain Defendants' Objections To Plaintiffs' Proposed Fraud, Misrepresentation and Civil Conspiracy Questions" (June 14, 1999) [*see* Appendix E, *supra*]

Brief In Opposition at 7: "Despite being repeatedly requested to do so by the trial court, petitioners failed to submit a feasible alternative verdict form. R.49258-72; 49296-49322; T.35967-68."

Brief in Opposition at 16: "Petitioners declined the trial court's repeated invitation to revise the verdict form, saying that it was not "defendants' job" to prepare and submit an acceptable form. T.36298-99."

T.35966-71 (June 11, 1999):

MR. HEIM [DEFENSE COUNSEL]: Your Honor, the only other thing I would mention here is plaintiffs handed up to Your Honor a whole bunch of questions [*see* Appendix D, *supra*]. * * * I think – I just started reading them, and it occurred to me that many of them, by themselves are – would either not be actionable or make any sense.

THE COURT: I'll tell you what you do. You haven't read them, right?

MR. HEIM: I've looked at them.

THE COURT: But if you look at these questions –

MR. HEIM: We may want to comment on them.

THE COURT: If you want to agree with some of them and disagree with others, let me know.

MR. HEIM: If we want to comment on them, I'll let you know.

THE COURT: Some of the questions may be exactly what you have in mind as to specificity. I don't know.

MS. ROSENBLATT [PLAINTIFFS' COUNSEL]: Just for the record, we did provide those last week. It wasn't just this morning.

MR. HEIM: No, I understand that. But I'm saying that our view is that the approach we used was the correct

approach. But I wanted to point out that some of those questions wouldn't make any sense, in any event.

But I can do that later in a separate submission.

MR. SCHNEIDER [DEFENSE COUNSEL]: Your Honor, with respect to those questions, I would submit that many of them are argumentative, and that that is not the solution to put before a jury, argumentative roll call of questions drawn out of the plaintiffs' complaint. I would direct Your Honor's attention again to the defendants' submission on fraud. The questions are simple. They're shorter. They're tied more closely to the law, and we would submit that you go with our fraud –

***

THE COURT: If you look at specificity as to the complaint. In other words, what I'm looking at. If you look at the complaint and say in the complaint: Certain allegations were made that the defendants did X, Y and Z, you could tailor questions, saying: Did the plaintiff prove that the defendants did X, Y and Z?

That can be relatively simple, if one just takes out of the complaint these issues. *** That's what I think – the purpose of this may not have been done to your liking in particular. But the concept is there, that if you want specificity, then there is a way of doing it. And saying, all right, let's look at what the defendants -- the plaintiffs have alleged in their complaint and what did they prove, and then use those questions to determine whether the jury says they were proven or not.

MR. SCHNEIDER: I guess my point was this: One, we should not create a list of questions that are suggestive and argumentative, which I would submit these are.

We would submit that, with respect to specificity, the better way to go is to let the jury say what it is they've found.

T.36298-99 (June 14, 1999)

THE COURT: They [i.e., the questions included in Appendix D, *supra*] would be incorporated in the verdict form?

MS. ROSENBLATT [PLAINTIFFS' COUNSEL]: Yes. If Your Honor felt we needed specificity, because the defendants said we must have specificity, once they're going to put in two or three, that tells one footnote of the story. We wanted to have a balanced overview of the areas that we felt that were areas of fraud, misrepresentation and conspiracy. And following the complaint we prepared this list of questions that we felt covered those areas.

Not exclusively. There are many other aspects of the fraud that are not covered. But it would be – they would literally be answering for many, many hours.

We don't feel it's necessary. We think the standard instructions cover it. But if you want specificity, we tried our best to give you specificity based on the common issues that this case was certified under.

MR. HEIM [DEFENSE COUNSEL]: And Your Honor, you know, it's simply not the defendants' job to propose misrepresentations of fact for the jury to consider. That's the plaintiffs' job, not ours. That's theirs.

Now, what they have done is given you things that are not statements of fact, which are capable of being misrepresentations. They are things like Number 3, which just doesn't get you anywhere; and like Number 5: Did the chief executive officers state the following before Congress?

So what? It's supposed to be tied to a cause of action here, and the cause of action that is listed under is fraud. And fraud has a legal meaning, as we lawyers all know. And so these questions and each and every one of them –

that's why we did this – these questions just don't fit within the framework of what is required to establish fraud. And that's the only way you can do it with the jury.

* * *

To make our point as to what's wrong with all these questions, we provided Your Honor with a memorandum at the end of it, a legal memorandum, under Tab C.

THE COURT: C? Okay.

MR. HEIM: And Tab C, that legal memorandum is there to show you why these questions just don't get you anywhere. And they don't, really.

THE COURT: Okay.

R. 48499-48563: "Certain Defendants' Preliminary Draft Phase I Trial Verdict Form" (June 4, 1999)

[Reproduced at Appendix B, *supra*]

R. 49142-49172: "Outline of Plaintiffs' Proposed Phase I Verdict Form Questions And Certain Defendants' Objections And Counter-Proposals Thereto" (June 14, 1999)

[Reproduced at Appendix C, *supra*]

Brief in Opposition at 7: "Petitioners Brown & Williamson Tobacco and American Tobacco announced their preference for the verdict form that was used as a "middle ground." although they now challenge it in their due process argument. T.35969."

Brief in Opposition at 17: "Brown & Williamson Tobacco and American Tobacco preferred the special interrogatory verdict form ultimately used, rather than the more specific interrogatory questions prepared by the Class, referring to the former as a preferable 'middle ground.' T.35969."

T.35969-71 (June 11, 1999) (emphasis added)

MR. SCHNEIDER [BROWN & WILLIAMSON COUNSEL]: I guess my point was this: One, we should not create a list of questions that are suggestive and argumentative, which I would submit these are.

We would submit that, with respect to specificity, the better way to go is to let the jury say what it is they've found.

But a middle ground, Your Honor, short of a list of suggested questions, let the plaintiffs, in their closing argument, argue to the jury what it is that they think are false statements, what it is that they think were published in Florida. Let them argue, and the jury's answer to the simple question will be in response.

THE COURT: Okay. I didn't think you wanted to do that. But you mentioned that.

MS. ROSENBLATT [PLAINTIFFS' COUNSEL]: If I understand that correctly, you know, and it's just a general question, that's fine. But if it's fill in the blanks and start remembering, you know, obviously, we object to that.

My understanding of what counsel just said is there would just be a general question on fraud, like on the verdict form, without specificity.

THE COURT: That's what he said. That was my understanding.

MR. HEIM [DEFENSE COUNSEL]: If that's what he said. I don't join in it. If that's what he said.

MR. SCHNEIDER: What I said, Your Honor, was we thought the appropriate way to go is to ask this question and ask for specificity in the manner in which we have done it. Let the jury tell us specifically what they have found.

THE COURT: That's at this end of the spectrum.

MR. SCHNEIDER: That's at this end of the spectrum.

The plaintiffs have suggested, instead, a roll call of argumentative questions [referring to questions in Appendix D, *supra*]. I oppose that. I still think that our submission is the way to go. What I said was, if the Court is not going to go in our direction, I don't think they should go to the plaintiffs' direction.

And the middle direction, *which I don't support*, but the middle direction is: Ask a simple question, argue in closing what you're going to argue, and whatever use can be made of that can be made of that.

We still think the proper way to go is ask the question, let the jury specify.

Brief in Opposition at 7-8: "The petition portrays the preclusion ruling as an extraordinary event, but when petitioners thought they would prevail on the merits, in Phase I, they repeatedly acknowledged the preclusionary effect of the findings, proclaiming, '[I]f the defendants win, we want as many people as possible bound' (R.10708-10809 at 96) and if the jury answers 'no . . . then not a single Florida smoker can recover." T.36007."

R.10708-10809: Hearing on Class Notice (October 1, 1996) (Excerpt)

MR. HEIM [DEFENSE COUNSEL]: In addition to that, there are problems with the opt-out period. I mean, how long are opt-outs going to have to opt out? Would you have a second 90-day period, a second 120-day period? And by suggesting that the first period wasn't good enough, was insufficient, you would always have the argument by somebody who said they were in the first notice group, that that was palpably, on its face, insufficient.

I think you create more problems than you solve. And I think there are good reasons why a so-called graduated or whatever it is program, is something that the Court shouldn't count on. It's too important. And I want to go to the importance of it again.

I'm not being altruistic. I don't pretend to be altruistic about it. Mr. Rosenblatt is right, we're going to try the case. We expect to win the case. And when we win the case, I want to be able to say, "You're bound by it." I don't want to have thousands and thousands of people come in and say, "That notice was no good. I have the right to bring my own individual action."

And that's why this notice is so important. It's two reasons. One is that Florida residents, who have the right under the Florida constitution to bring a lawsuit, actually get to read the notice. And Ms. Kinsella says, "Oh, advertising – "

THE COURT: I've heard this argument.

MR. HEIM: I know you've had; but, Judge, I think, for the same reasons, it's terribly, vitally important. And for the second reason, because I want them bound. I want them bound in case we win.

THE COURT: I understand. That's why you objected to publication.

T. 36006-07 Hearing on Verdict Form (June 11, 1999)

THE COURT: I have a question for Mr. Kirby. You made the comment that not a single class member will ever be entitled to or recover – I'm not sure what you said – punitive damages. Let me see what you did say.

MR. KIRBY [REYNOLDS COUNSEL]: Let me go back and find it.

THE COURT: All right. You said: Not a single Florida so-called addicted, injured smoker in this class can ever recover punitive damages from any of the defendants.

MR. KIRBY: That was in the context, Your Honor, of me telling you why – Mrs. Rosenblatt said that the question we proposed [i.e., whether defendants' conduct met the standard for punitive damages] was meaningless.

THE COURT: I don't understand what you mean when you say – because of the evidence or because of some law?

MR. KIRBY: No, I thought what I said – she said the question we submitted was meaningless; that an answer to it wouldn't mean anything. And I was telling Your Honor –

THE COURT: Oh.

MR. KIRBY: – if they answer the question "No." and that is what I said.

THE COURT: No. I wanted to be sure that's what you said.

MR. KIRBY: I said: I'll tell you why, if the answer is no, then not a single Florida smoker can recover [punitive damages].

Brief in Opposition at 14: "For example, in discussing the finding of negligence, petitioners now state: 'This finding is a cipher' (Pet. at 16), but petitioners argued below that the same question was very meaningful because 'an adverse finding is very harmful to the defense . . . where the question is exactly what the trial plan says we're supposed to be trying [and] . . . it's not a happy event if that's decided against us.' T.35918-19."

T.35917-20 (June 10, 1999)

MR. HEIM [DEFENSE COUNSEL]: . . . . When the defendants ask a question like 6A [on form reproduced at Appendix B, *supra*], which is where we started here, prove that any defendant did not exercise the degree of care which a reasonable cigarette manufacturer would exercise under like circumstances, that's a real – that's an adverse finding there, is very harmful to the defense. That is what is known as an integral element of a cause of action, exactly what the trial plan says we're supposed to be trying. You can't try the whole cause of action; we all recognized that from the beginning.

But the trial plan talks about trying the integral elements that are common, and that's what we're trying to do. It's not a happy event if that's decided against us; it's not a happy event if they decide that there was a feasible alternative design. But those are the common questions that are integral elements of the cause of action.

And the way this case is structured, we are actually going to complete a cause of action. We're going to complete it as soon as we finish the integral elements that are common, and then goes go to Phase II, and with the very first class representative trial, do the common issues where together you at least, to the extent that it can be done, you will get to a cause of action determination.

That's what we're trying to do here. And we're working to try to make it something that we didn't invest 11

months of our life and then get to the end and say: How do we possibly use this when we're finished?

Brief in Opposition at 8, footnote 9: "Dan Webb, lead counsel for Philip Morris, argued that Philip Morris' CEO 'is going to tell you he understands your verdict very very well. He is not going to tell you he does not know what your verdict means. He is not going to tell you that at all.' T.51085"

T. 51085 (May 22, 2000) (emphasis added)

> MR. WEBB [PHILIP MORRIS COUNSEL]: ... He's [Mike Szymanczyk, Philip Morris CEO] going to tell you that – he understands – Mr. Rosenblatt – wait until he gets on the stand. He's going to tell you he understands your verdict very, very well. He's not going to tell you he doesn't know what your verdict means. He's not going to tell you that at all.
>
> He will tell you *he doesn't know what all evidence you relied upon to reach your verdict. Nobody does.*

RECORD MATERIALS RELATED TO PRESERVATION OF PREEMPTION ISSUE

Brief in Opposition at 9: "Although petitioners object to the Phase I jury instructions on preemption, which represented a combination of the litigants' submissions, class counsel twice offered to modify the instruction: 'I have volunteered to take out the language they had a problem with," (T.36285, 36152-53), but petitioners declined: "I don't think a shortened instruction . . . is an appropriate way to go.' T.36153."

T.36284-86 (June 14, 1999)

MS. ROSENBLATT [PLAINTIFFS' COUNSEL]: And we have the same objections to the last two paragraphs [of Defendants' proposed preemption charge]. It absolutely ignores the exception of deception, the obligation not to deceive, and the conspiracy, where there's no preemption that applies. It's not appropriate. It's not based upon a neutral presentation of preemption, and it would be more confusing and misleading, and it's really not necessary.

I think if they understand the failure to warn after July 1, '69 is the key – and I think that was covered in our instruction which was Engle Number 10, which you know very clearly says: Since July 1, 1969, there have been required Surgeon General warnings appearing on packages of cigarettes sold in the United States. Pursuant to federal law, you may not find any finding of liability on a determination that after July 1, 1969, one or more of these defendants should have included additional or more clearly stated warnings on their cigarette packages or in advertisements. Federal law does not limit the liability of any defendants against claims of failure to warn prior to July 1 '69. I have volunteered to take out the language they had a problem with in between [i.e., language in plaintiffs' proposed instruction; not erroneous language that

appeared in final instruction], and if you want to – this is the subject of preemption that has been mentioned sometimes during the trial. It's only been mentioned in terms of an objection. "Objection, preemption." That's the only time the jury has heard the word.

But if there's a need to describe the word, this describes it simplistically, without getting into what Congress did, what Congress didn't do, what exceptions apply, how they work here. I think this is a big mistake, and it would have to be in far more detail. And it's unnecessary.

T.36151-54 (June 14, 1999)

MS. ROSENBLATT [PLAINTIFFS' COUNSEL]: . . .All the jury needs to know is that you can't base your decision that there should have been better or different warnings after July 1, 1969. And we totally disagree, because there's a whole line of Florida law that, once you speak, once you present information, you've got to tell the whole truth. And that incorporates fraud – I've got the case with me when we come to that count, that incorporates the fraud counts in each of the counts. What I would suggest, you know, rather than start debating what's in and what's out, to simply have the instruction this way, the first few sentences: Since July 1, 1969 there have been required Surgeon General warnings appearing on packages of cigarettes sold in the United States. Pursuant to federal law, you may not base any finding of liability on a determination that after July 1, 1969, one or more of these defendants should have included additional or more clearly stated warnings on their cigarette packages or in advertisements.

Then go to the final sentence: Federal law does not limit the liability of any Defendant against claims of failure to warn prior to July 1, '69. And the other aspects

will be covered in other instructions. We prefer to have it in but, as a compromise, that would very simply explain to the jury that the first two sentences and the last sentence without the word "finally," because I was trying to have balance and say: Well, that's out, but, however, these are in. But if we take out the "these are in" aspect, I think that that's a neutral, fair way to clearly present it.

Congress shouldn't be involved. There's no prohibitions. Simply a fact that they're not to make a determination based upon post July 1, '69 failure to warn. And it's related to cigarette packages and advertisements.

That's specifically from Cipollone.

MR. MOODHE [COUNCIL FOR TOBACCO RESEARCH COUNSEL]: Your Honor, I think that in order to, for the jury to understand and properly apply this very, very important concept, which even Your Honor, I think, at times has admitted it's not an easy one, sometimes, to get a hold of. It's better on this particular subject to say more than less.

I think the defendants' instruction correctly lays out the law as we understand it, and does so in a fashion that we think will be helpful to the jury in really being able to sort through what it can and cannot do in this area. I don't think a shortened instruction on this very important concept is an appropriate way to go with this jury.

The other point I neglected to make before, and just to keep the record straight, if there's any instruction here because of the arguments I've made before regarding preemptive effects of the cigarette labeling legislation, and the fact that West wasn't adopted until 1976, at best, at most the plaintiffs can only have a negligent failure to warn claim, not a strict liability failure to warn claim.

So to that extent, the Court, I think, would be appropriate in considering the need for the type of language

that plaintiffs have proposed here vis-à-vis that more limited theory of liability on a failure to warn.

APPENDIX G

RECORD MATERIALS RELATED TO AFFIRMATIVE MISREPRESENTATION CLAIMS OF FARNAN AND DELLA VECCHIA

Mary Farnan

T.42216-17 (December 9, 1999)

PLAINTIFFS' COUNSEL. Now, in this ad that I'm going to show the jury now, it has a man and a woman. I don't know why the men always have their shirts open, but they seem to always have their shirts open in these ads. And the ads says -- both the man and woman are apparently saying, "We want low tar." Well, what did that convey to you? Why did people want low tow?

MARY FARNAN. It was safer. Much safer.

Q. To you, low tar meant it was safer than more tar?

MR. JOHNSON: Objection. Leading, Your Honor.

THE COURT: It is leading. Rephrase.

BY [PLAINTIFFS' COUNSEL]:

Q. What did low tar mean to you, as you saw these various ads stressing low tar in your mind? What was the difference between low tar and higher tar?

A. Low tar would be safer because it didn't have -- it would be less impurities.

T.42221 (December 9, 1999)

PLAINTIFFS' COUNSEL: ... And the ad says -- both the man and the woman are apparently saying, 'We want low tar.' Well, what did that convey to you? Why did people want low tar.

MARY FARNAN: It was safer. Much safer. ...

Q: What did low tar mean to you as you saw these various ads stressing low tar in your mind? What was the difference between low tar and higher tar?

A: Low tar would be safer because it didn't have -- it would be less impurities.

***

Q: ... Oh, by the way, what did the word mean to you when you would see an ad not only saying low tar, but ultra low tar? What did ultra low tar mean to you?

A: I would think it would be even safer because it would have less tar.

T.42223-24 (December 9, 1999)

PLAINTIFFS' COUNSEL. Discover Camel Lights. When you would see an ad, Mrs. Farnan, and the word "light" was in the ad, what did that mean to you?

MARY FARNAN. To me, that meant it was a safer cigarette because it had less impurities in it. It had less tar.

They always put the numbers up there, too, you know; that they were, you know, less, 9 milligrams, 5 milligrams.

T.42239-42 (December 9, 1999)

PLAINTIFFS' COUNSEL: [I]n reviewing the ads we have been over today, in thinking about the ads that you have seen over the years, '60s, '70s, '80s, early on, tell me in your mind what effect these ads had on you individually, did the ads portray smoking as something that was essentially safe or unsafe?

MARY FARNAN: I thought they were safe.

Q: Healthy or unhealthy?

A: I didn't see anything unhealthy at all about them.

Q: Did you ever, ever in your life, see a cigarette ad where one of the models was -- either a man or woman was either elderly or infirm or disabled in any way?

A: No, sir

T.42383-84 (December 10, 1999)

MICHAEL SIEGEL (PLAINTIFFS' EXPERT WITNESS): I think the advertising had -- really had two major impacts on [Mary Farnan]. First of all, I think the advertising convinced her that cigarette smoking was safe, and that despite the fact that she had heard information from health -- public health officials, and maybe she had seen those warnings, occasionally saying the cigarette smoking is harmful, I think the advertising basically convinced her that that wasn't true; that they are actually a safe product. And I think they convinced her specifically that low-tar, low nicotine would be a safe product.

And the second effect I think it had on her is that I think that whereas without the advertising, she may have been swayed by the fact that she heard that cigarette smoking was harmful. Because she was exposed to the advertising telling her, suggesting to her that it was safe, I think it didn't allow that to sway her, and therefore, she continued to smoke.

Angie Della Vecchia

T.43759-60 (January 25, 2000)

MICHAEL SIEGEL (PLAINTIFFS' EXPERT WITNESS): My opinion is that cigarette advertising played a major contributing role to Mrs. Della Vecchia's starting

to smoke at age 11; to her continuing to smoke about a pack a day for the first 20 years; for her switching to a different brand of cigarettes in the 1970s, rather than quitting smoking; and in her continuing to smoke for an additional 20 years, until she finally quit at the time of her lung cancer.

T.43948-49 (January 31, 2000)

PLAINTIFFS' COUNSEL. Now, when Angie was unable to successfully quit with you in 1977, did she continue to smoke the unfiltered Pall Malls?

RALPH DELLA VECCHIA. No, I had asked her, I said, "If you couldn't stop, at least, hon, try and take a filtered cigarette." And she chose Winston Light 100s.

Q. Why did you make that recommendation to her? What did you believe about the lights over the Pall Malls?

A. Well, I thought the lights at that time, or whatever, were better than an unfiltered cigarette.

Q. Based on what? Why did you think that?

A. Less nicotine and tar.

Q. Which meant what to you?

A. Well, be safer for her.

T.44269-70 (February 2, 2000)

ANGIE DELLA VECCHIA (BY VIDEOTAPE). My husband and I thought we should quit. We knew it was -- now we know it's not good for you. And he did; he quit. And I tried, but -- maybe a couple hours, and I lit up. And my husband said, "Well, if you're going to smoke,

please, please, smoke a filter." So that's what I did. I went to a light and a filter cigarette.

PLAINTIFFS' COUNSEL. What brand?

A. Winston Light 100s.

Q. What was the reason for switching to the Winston Light 100s?

A. Well, because they said they were light, I mean, I would -- I thought: Well, that's better than full strength of nicotine and tar and -- you know, they said it was lower in tar, so I thought it was better for my health, so I didn't smoke a nonfilter anymore.

Q. When you said "they said" it was light, who are you referring to?

A. The commercials for cigarettes, the advertisements in the newspaper.

APPENDIX H

T. 50236-50 (Phase II-A Jury Charge, April 5, 2000) (Excerpts) (emphasis added)

THE COURT: . . . . The issues that you determined in Phase I were not relitigated in Phase II; therefore you will now have to determine whether defendants' conduct *upon which you based your Phase I verdict* was the legal cause of injury to Mary Farnan . . . and Angie Della Vecchia.

* * *

In Phase I of this trial, you determined that the defendant made a false statement of material fact, either knowing the statement was false or being without knowledge as to its truth or falsity, with the intention of misleading smokers.

In Phase II of this trial, you must now determine the following:

First, whether Mary Farnan . . . and/or Angie Della Vecchia were aware of any false statement of material fact *which formed the basis of your verdict in Phase I . . .*

* * *

In Phase I of this trial, you determined that defendants concealed or omitted certain material information, not otherwise known or available, knowing the material was false or misleading, or failed to disclose a material fact concerning or proving the health effects and/or addictive nature of smoking cigarettes.

In Phase II of this trial, you must determine the following:

Whether any such concealment or omission of material information concerning the health effects and/or addictive nature of smoking cigarettes, *as determined in Phase I*, was the legal cause of injury to Mary Farnan . . . and/or Angie Della Vecchia.

APPENDIX I

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 94-08273 CA (22)

HOWARD A. ENGLE, M.D., et al.,

Plaintiffs,

v.

RJ REYNOLDS TOBACCO COMPANY, et al.,

Defendants.
_____/

FILED
APR 07 2000
CLERK, CIRCUIT & COUNTY COURTS

VERDICT FORM FOR PHASE II

We, the Jury, return the following Verdict:

Question No. 1

[Legal Causation]

In your verdict of July 7, 1999, you found that smoking cigarettes causes some diseases including lung cancer and laryngeal (throat) cancer.

Was smoking cigarettes a legal cause of Mary Farnan's lung cancer?

Yes ✓ No_____

Was smoking cigarettes a legal cause of Frank Amodeo's laryngeal (throat) cancer?

Yes ✓ No_____

Was smoking cigarettes a legal cause of Angie Della Vecchia's lung cancer and death?

Yes ✓ No_____

If your answer as to one or more of the Class Representatives, above, is "No", your verdict is for the Defendants as to that Class Representative and you should not answer any further questions as to that Class Representative. If you answered "No" to Question No. 1 for all three Class Representatives, you do not need to answer any further questions. Please sign and date the last page. If you answered "Yes" as to one or more of the Class Representatives, please answer the following questions as to that or those Class Representatives.

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Question No.2

[Strict Liability]

You found in your Verdict of July 7, 1999 that each of the Defendant tobacco companies placed cigarettes on the market that were defective and unreasonably dangerous, both before and after July 1, 1974 (except for Brooke whose liability is limited to after July 1, 1974).

Were defective and unreasonably dangerous cigarettes placed on the market by one or more of the Defendant tobacco companies a legal cause of damage to Class Representatives Mary Farnan, and/or Frank Amodeo and/or a legal cause of death to Angie Della Vecchia, deceased?

Please answer "Yes" or "No" as to each Class Representative below.

a. Mary Farnan

Philip Morris, Incorporated	Yes ✓	No ____
RJ Reynolds Tobacco Company	Yes ✓	No ____
Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company	Yes ✓	No ____
Lorillard Tobacco Company/Lorillard, Inc.	Yes ✓	No ____
Liggett Group Inc.	Yes ✓	No ____
Brooke Group Holding Inc.	Yes ✓	No ____

b. Frank Amodeo

Philip Morris, Incorporated	Yes ✓	No ____
RJ Reynolds Tobacco Company	Yes ✓	No ____
Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company	Yes ✓	No ____
Lorillard Tobacco Company/Lorillard, Inc.	Yes ✓	No ____
Liggett Group Inc.	Yes ✓	No ____
Brooke Group Holding Inc.	Yes ✓	No ____

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c. **Estate of Angie Della Vecchia, deceased**

Philip Morris, Incorporated	Yes ✓	No ____
RJ Reynolds Tobacco Company	Yes ✓	No ____
Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company	Yes ✓	No ____
Lorillard Tobacco Company/Lorillard, Inc.	Yes ✓	No ____
Liggett Group Inc.	Yes ✓	No ____
Brooke Group Holding Inc.	Yes ✓	No ____

Question No. 3

[Fraud and Misrepresentation]

In your July 7, 1999 Verdict you found that each of the Defendants made a false statement of a material fact, either knowing the statement was false or misleading, or being without knowledge as to its truth or falsity with the intention of misleading smokers, both before and after May 5, 1982 (except for Brooke, whose liability is limited to after May 5, 1982).

Did Class Representatives Mary Farnan, Frank Amodeo and/or Angie Della Vecchia, deceased rely on a false statement(s) of material fact that was a legal cause of damage or death to that Class Representative?

Please answer "Yes" or "No" as indicated below.

Mary Farnan

Philip Morris, Incorporated		
before May 5, 1982	Yes ____	No ____
after May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____
RJ Reynolds Tobacco Company		
before May 5, 1982	Yes ____	No ____
after May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____
Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company		
before May 5, 1982	Yes ____	No ____
after May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____

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Lorillard Tobacco Company/Lorillard, Inc.
before May 5, 1982 — Yes ____ No ____
after May 5, 1982 — Yes ____ No ____
Both before and after May 5, 1982 — Yes ✓ No ____

Liggett Group Inc.
before May 5, 1982 — Yes ____ No ____
after May 5, 1982 — Yes ____ No ____
Both before and after May 5, 1982 — Yes ✓ No ____

Brooke Group Holding Inc.
after May 5, 1982 — Yes ✓ No ____

Council for Tobacco Research
before May 5, 1982 — Yes ____ No ____
after May 5, 1982 — Yes ____ No ____
Both before and after May 5, 1982 — Yes ✓ No ____

Tobacco Institute
before May 5, 1982 — Yes ____ No ____
after May 5, 1982 — Yes ____ No ____
Both before and after May 5, 1982 — Yes ✓ No ____

Frank Amodeo

Philip Morris, Incorporated
before May 5, 1982 — Yes ____ No ____
after May 5, 1982 — Yes ____ No ____
Both before and after May 5, 1982 — Yes ✓ No ____

RJ Reynolds Tobacco Company
before May 5, 1982 — Yes ____ No ____
after May 5, 1982 — Yes ____ No ____
Both before and after May 5, 1982 — Yes ✓ No ____

Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company
before May 5, 1982 — Yes ____ No ____
after May 5, 1982 — Yes ____ No ____
Both before and after May 5, 1982 — Yes ✓ No ____

Lorillard Tobacco Company/Lorillard, Inc.
before May 5, 1982 — Yes ____ No ____
after May 5, 1982 — Yes ____ No ____
Both before and after May 5, 1982 — Yes ✓ No ____

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Liggett Group Inc.

before May 5, 1982	Yes ____	No ____
after May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____

Brooke Group Holding Inc.

after May 5, 1982	Yes ✓	No ____

Council for Tobacco Research

before May 5, 1982	Yes ____	No ____
after May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____

Tobacco Institute

before May 5, 1982	Yes ____	No ____
after May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____

Angie Della Vecchia, deceased

Philip Morris, Incorporated

before May 5, 1982	Yes ____	No ____
after May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____

RJ Reynolds Tobacco Company

before May 5, 1982	Yes ____	No ____
after May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____

Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company

before May 5, 1982	Yes ____	No ____
after May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____

Lorillard Tobacco Company/Lorillard, Inc.

before May 5, 1982	Yes ____	No ____
after May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____

Liggett Group Inc.

before May 5, 1982	Yes ____	No ____
after May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____

Brooke Group Holding Inc.

after May 5, 1982	Yes ✓	No ____

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Council for Tobacco Research

before May 5, 1982	Yes ____	No ____
after May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____

Tobacco Institute

before May 5, 1982	Yes ____	No ____
after May 5, 1982	Yes ✓	No ____
Both before and after May 5, 1982	Yes ____	No ____

Question No. 4.

[Fraud by Concealment]

In your Verdict of July 7, 1999 you found that each of the Defendants concealed or omitted material information, not otherwise known or available, knowing the material was false and misleading, or failed to disclose a material fact concerning or proving the health effects and/or addictive nature of smoking cigarettes, both before and after May 5, 1982 (except for Brooke, whose liability is limited to after May 5, 1982).

As to each of the Defendants, was that Defendant's concealment or omission a legal cause of injury to Class Representatives Mary Farnan, and/or Frank Amodeo and/or Angie Della Vecchia, deceased?

Please answer "Yes" or "No" as indicated below.

Mary Farnan

Philip Morris, Incorporated

before May 5, 1982	Yes ____	No ____
after May 5, 1982	Yes ✓	No ____
Both before and after May 5, 1982	Yes ____	No ____

RJ Reynolds Tobacco Company

before May 5, 1982	Yes ____	No ____
after May 5, 1982	Yes ✓	No ____
Both before and after May 5, 1982	Yes ____	No ____

Brown & Williamson Tobacco Corporation, Individually and as successor by merger to the American Tobacco Company

before May 5, 1982	Yes ____	No ____
after May 5, 1982	Yes ✓	No ____
Both before and after May 5, 1982	Yes ____	No ____

Lorillard Tobacco Company/Lorillard, Inc.

before May 5, 1982	Yes ____	No ____
after May 5, 1982	Yes ✓	No ____
Both before and after May 5, 1982	Yes ____	No ____

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Liggett Group Inc.
before May 5, 1982 — Yes ____ No ____
after May 5, 1982 — Yes ____ No ____
Both before and after May 5, 1982 — Yes ✓ No ____

Brooke Group Holing Inc.
after May 5, 1982 — Yes ✓ No ____

Council for Tobacco Research
before May 5, 1982 — Yes ____ No ____
after May 5, 1982 — Yes ____ No ____
Both before and after May 5, 1982 — Yes ✓ No ____

Tobacco Institute
before May 5, 1982 — Yes ____ No ____
after May 5, 1982 — Yes ____ No ____
Both before and after May 5, 1982 — Yes ✓ No ____

Frank Amodeo

Philip Morris, Incorporated
before May 5, 1982 — Yes ____ No ____
after May 5, 1982 — Yes ____ No ____
Both before and after May 5, 1982 — Yes ✓ No ____

RJ Reynolds Tobacco Company
before May 5, 1982 — Yes ____ No ____
after May 5, 1982 — Yes ____ No ____
Both before and after May 5, 1982 — Yes ✓ No ____

Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company
before May 5, 1982 — Yes ____ No ____
after May 5, 1982 — Yes ____ No ____
Both before and after May 5, 1982 — Yes ✓ No ____

Lorillard Tobacco Company/Lorillard, Inc.
before May 5, 1982 — Yes ____ No ____
after May 5, 1982 — Yes ____ No ____
Both before and after May 5, 1982 — Yes ✓ No ____

Liggett Group Inc.
before May 5, 1982 — Yes ____ No ____
after May 5, 1982 — Yes ____ No ____
Both before and after May 5, 1982 — Yes ✓ No ____

Brooke Group Holding Inc.
after May 5, 1982 — Yes ✓ No ____

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Council for Tobacco Research
before May 5, 1982 Yes ____ No ____
after May 5, 1982 Yes ____ No ____
Both before and after May 5, 1982 Yes ✓ No ____

Tobacco Institute
before May 5, 1982 Yes ____ No ____
after May 5, 1982 Yes ____ No ____
Both before and after May 5, 1982 Yes ✓ No ____

Angie Della Vecchia, deceased

Philip Morris, Incorporated
before May 5, 1982 Yes ____ No ____
after May 5, 1982 Yes ____ No ____
Both before and after May 5, 1982 Yes ✓ No ____

RJ Reynolds Tobacco Company
before May 5, 1982 Yes ____ No ____
after May 5, 1982 Yes ____ No ____
Both before and after May 5, 1982 Yes ✓ No ____

Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company
before May 5, 1982 Yes ____ No ____
after May 5, 1982 Yes ____ No ____
Both before and after May 5, 1982 Yes ✓ No ____

Lorillard Tobacco Company/Lorillard, Inc.
before May 5, 1982 Yes ____ No ____
after May 5, 1982 Yes ____ No ____
Both before and after May 5, 1982 Yes ✓ No ____

Liggett Group Inc.
before May 5, 1982 Yes ____ No ____
after May 5, 1982 Yes ____ No ____
Both before and after May 5, 1982 Yes ✓ No ____

Brooke Group Holding Inc.
after May 5, 1982 Yes ✓ No ____

Council for Tobacco Research
before May 5, 1982 Yes ____ No ____
after May 5, 1982 Yes ____ No ____
Both before and after May 5, 1982 Yes ✓ No ____

WI0503307

Tobacco Institute

before May 5, 1982	Yes ____	No ____
after May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____

Question No. 5

[Civil Conspiracy-Misrepresentation]

In your Verdict of July 7, 1999 you found that all of the Defendants entered into an agreement to misrepresent information relating to the health effects of cigarette smoking, or the addictive nature of smoking cigarettes, with the intention that smokers and members of the public rely to their detriment.

As to each of the Class Representatives below, was his or her injury legally caused by acts done in furtherance of an agreement among two or more defendants to commit an act of fraud or misrepresentation, as found in Phase One? Please answer "Yes" or "No" with reference to the periods of time before and after May 5, 1982.

Mary Farnan

Before May 5, 1982	Yes ____	No ____
After May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____

Frank Amodeo

Before May 5, 1982	Yes ____	No ____
After May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____

Angie Della Vecchia, deceased

Before May 5, 1982	Yes ____	No ____
After May 5, 1982	Yes ____	No ____
Both before and after May 5, 1982	Yes ✓	No ____

Question No. 6.

[Civil Conspiracy-Concealment]

In your Verdict of July 7, 1999 you found that all of the Defendants entered into an agreement to conceal or omit information regarding the health effects of cigarette smoking, or the addictive nature of smoking cigarettes, with the intention that smokers and members of the public rely to their detriment.

As to each of the Class Representatives below, was his or her injury legally caused by acts done before or after May 5, 1982 in furtherance of an agreement among two or more of the defendants to commit an act of omission or concealment? Please answer "Yes" or "No" with reference to the periods of time before and after May 5, 1982.

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Mary Farnan
Before May 5, 1982 — Yes ____ No ____
After May 5, 1982 — Yes ____ No ____
Both before and after May 5, 1982 — Yes ✓ No ____

Frank Amodeo
Before May 5, 1982 — Yes ____ No ____
After May 5, 1982 — Yes ____ No ____
Both before and after May 5, 1982 — Yes ✓ No ____

Angie Della Vecchia, deceased
Before May 5, 1982 — Yes ____ No ____
After May 5, 1982 — Yes ____ No ____
Both before and after May 5, 1982 — Yes ✓ No ____

Question No. 7.

[Breach of Implied Warranty]

In your Verdict of July 7, 1999, you found that each of the Defendant Tobacco Companies sold or supplied cigarettes that were defective in that they were not reasonably fit for the uses intended, both before and after July 1, 1974 (except for Brooke whose liability is limited to after July 1, 1974).

As to each of the Defendants, below, please state whether the sale or supply of defective cigarettes was a legal cause of damage to Class Representatives Mary Farnan and/or Frank Amodeo and/or was a legal cause of death to Angie Della Vecchia, deceased.

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated

Mary Farnan — Yes ✓ No ____
Frank Amodeo — Yes ✓ No ____
Angie Della Vecchia, deceased — Yes ✓ No ____

RJ Reynolds Tobacco Company

Mary Farnan — Yes ✓ No ____
Frank Amodeo — Yes ✓ No ____
Angie Della Vecchia, deceased — Yes ✓ No ____

Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company

Mary Farnan — Yes ✓ No ____
Frank Amodeo — Yes ✓ No ____
Angie Della Vecchia, deceased — Yes ✓ No ____

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Lorillard Tobacco Company/Lorillard, Inc.

Mary Farnan	Yes ✓	No ____
Frank Amodeo	Yes ✓	No ____
Angie Della Vecchia, deceased	Yes ✓	No ____

Liggett Group Inc.

Mary Farnan	Yes ✓	No ____
Frank Amodeo	Yes ✓	No ____
Angie Della Vecchia, deceased	Yes ✓	No ____

Brooke Group Holding Inc.

Mary Farnan	Yes ✓	No ____
Frank Amodeo	Yes ✓	No ____
Angie Della Vecchia, deceased	Yes ✓	No ____

Question No. 8.

[Breach of Express Warranty]

In your Verdict of July 7, 1999, you found that each of the Defendant tobacco companies sold or supplied cigarettes that, at the time of sale or supply, did not conform to representations of fact made by said Defendant(s), either orally or in writing, both before and after July 1, 1974 (except for Brooke whose liability is limited to after July 1, 1974).

As to each of the Defendants, below, was that Defendant's breach of express warranty a legal cause of damage to Class RepresentativesMary Farnan and/or Frank Amodeo and/or a legal cause of death to Angie Della Vecchia, deceased?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated

Mary Farnan	Yes ✓	No ____
Frank Amodeo	Yes ✓	No ____
Angie Della Vecchia, deceased	Yes ✓	No ____

RJ Reynolds Tobacco Company

Mary Farnan	Yes ✓	No ____
Frank Amodeo	Yes ✓	No ____
Angie Della Vecchia, deceased	Yes ✓	No ____

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Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company

Mary Farnan	Yes ✓	No ____
Frank Amodeo	Yes ✓	No ____
Angie Della Vecchia, deceased	Yes ✓	No ____

Lorillard Tobacco Company/Lorillard, Inc.

Mary Farnan	Yes ✓	No ____
Frank Amodeo	Yes ✓	No ____
Angie Della Vecchia, deceased	Yes ✓	No ____

Liggett Group Inc.

Mary Farnan	Yes ✓	No ____
Frank Amodeo	Yes ✓	No ____
Angie Della Vecchia, deceased	Yes ✓	No ____

Brooke Group Holding Inc.

Mary Farnan	Yes ✓	No ____
Frank Amodeo	Yes ✓	No ____
Angie Della Vecchia, deceased	Yes ✓	No ____

Question No. 9.

[Negligence]

In your Verdict of July 7, 1999, you found that all of the Defendant Tobacco Companies failed to exercise the degree of care which a reasonable cigarette manufacturer would exercise under like circumstances, both before and after July 1, 1969 (except for Brooke whose liability is limited to after July 1, 1969).

As to each of the Defendants, below, please state whether that Defendant's negligence was a legal cause of damage to Class Representatives Mary Farnan and/or Frank Amodeo and/or a legal cause of death to Angie Della Vecchia, deceased.

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated

Mary Farnan	Yes ✓	No ____
Frank Amodeo	Yes ✓	No ____
Angie Della Vecchia, deceased	Yes ✓	No ____

W0503311

RJ Reynolds Tobacco Company

Mary Farnan	Yes ✓	No ____
Frank Amodeo	Yes ✓	No ____
Angie Della Vecchia, deceased	Yes ✓	No ____

Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company

Mary Farnan	Yes ✓	No ____
Frank Amodeo	Yes ✓	No ____
Angie Della Vecchia, deceased	Yes ✓	No ____

Lorillard Tobacco Company/Lorillard, Inc.

Mary Farnan	Yes ✓	No ____
Frank Amodeo	Yes ✓	No ____
Angie Della Vecchia, deceased	Yes ✓	No ____

Liggett Group Inc.

Mary Farnan	Yes ✓	No ____
Frank Amodeo	Yes ✓	No ____
Angie Della Vecchia, deceased	Yes ✓	No ____

Brooke Group Holding Inc.

Mary Farnan	Yes ✓	No ____
Frank Amodeo	Yes ✓	No ____
Angie Della Vecchia, deceased	Yes ✓	No ____

Question No. 10

[Intentional Infliction of Emotional Distress]

In your Verdict of July 7, 1999, you found that the Plaintiffs had proven that all of the Defendant Tobacco Companies engaged in extreme and outrageous conduct or with reckless disregard relating to cigarettes sold or supplied to Florida smokers with the intent to inflict severe emotional distress.

As to each of the Defendants below, please state whether that Defendant's extreme and outrageous conduct was a legal cause of injury to Class Representatives Mary Farnan and/or Frank Amodeo.

Please answer "Yes" or "No" as to each Defendant, below:

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Philip Morris, Incorporated

Mary Farnan	Yes ✓	No ____
Frank Amodeo	Yes ✓	No ____

RJ Reynolds Tobacco Company

Mary Farnan	Yes ✓	No ____
Frank Amodeo	Yes ✓	No ____

Brown & Williamson Tobacco Corporation, Individually and as successor by merger to the American Tobacco Company

Mary Farnan	Yes ✓	No ____
Frank Amodeo	Yes ✓	No ____

Lorillard Tobacco Company/Lorillard, Inc.

Mary Farnan	Yes ✓	No ____
Frank Amodeo	Yes ✓	No ____

Liggett Group Inc.

Mary Farnan	Yes ✓	No ____
Frank Amodeo	Yes ✓	No ____

Brooke Group Holding Inc.

Mary Farnan	Yes ✓	No ____
Frank Amodeo	Yes ✓	No ____

Question No. 11

[Statute of Limitations]

a. Did Frank Amodeo know, or should he have known, on or before May 5, 1990, in the exercise of reasonable care that he was addicted to smoking?

Yes ✓ No ____

b. Did Frank Amodeo know, or should he have known, on or before May 5, 1990, in the exercise of reasonable care that he had cancer and that there was a reasonable possibility that his cancer was caused by cigarette smoking?

Yes ✓ No ____

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Question No. 12

[Comparative Fault]

If your answer to Question Nos. 2, 7, 8 and/or 9 as to one or more of the Class Representatives was "Yes" as to any Defendant, please answer the following questions relating to that Class Representative.

a. Was there fault on the part of one or more of the Class Representatives that was a legal cause of his or her damage?

Please answer "Yes" or "No" as to each Class Representative, below:

Mary Farnan	Yes ✓	No ____
Frank Amodeo	Yes ✓	No ____
Angie Della Vecchia, Deceased	Yes ✓	No ____

b. State the percentage of any fault which was a legal cause of damage to Class Representative Mary Farnan, that you charge to:

Philip Morris, Incorporated	5 %
RJ Reynolds Tobacco Company	60 %
Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company	20 %
Lorillard Tobacco Company/Lorillard, Inc.	5 %
Liggett Group Inc.	0 %
Brooke Group Holding Inc.	0 %
Mary Farnan	20 %
TOTAL MUST BE	100%

c. State the percentage of any fault which was a legal cause of damage to Class Representative Frank Amodeo that you charge to:

Philip Morris, Incorporated	20 %
RJ Reynolds Tobacco Company	5 %
Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company	30 %

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Lorillard Tobacco Company/Lorillard, Inc.	0 %
Liggett Group Inc.	0 %
Brooke Group Holding Inc.	0 %
Frank Amodeo	25 %
TOTAL MUST BE	**100%**

d. State the percentage of any fault which was a legal cause of damage to **Angie Della Vecchia, Deceased** that you charge to:

Philip Morris, Incorporated	0 %
RJ Reynolds Tobacco Company	50 %
Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company	35 %
Lorillard Tobacco Company/Lorillard, Inc.	0 %
Liggett Group Inc.	0 %
Brooke Group Holding Inc.	0 %
Angie Della Vecchia, Deceased	15 %
TOTAL MUST BE	**100%**

Your answers to Question 12(b)(c) and (d) must each total 100%, and should include a zero for any Defendant or Class Representative you found not at fault.

If you answered "No" as to all Class Representatives and all Defendants in Questions 2 through 10, then your verdict is for the Defendants and you should not continue any further except to sign and date the Verdict Form. If you answered "Yes" as to any Class Representative against any Defendant, in any of Questions 2 through 10, please answer Question Nos. 13 and 14 as it pertains to that or those Class Representatives.

W0503315

Question No. 13

[Damages]

a. **What is the total amount of damages sustained by Class Representative Mary Farnan?**

1. **ECONOMIC DAMAGES** [including medical expense, hospitalization, medical care in the past or to be obtained in the future; lost earnings and lost ability to earn money in the future; loss of ability to earn money in the past and in the future; and loss of household services]

a.$ 1,250,000

2. **INTANGIBLE DAMAGES** [damages incurred in the past or that will be experienced in the future, including bodily injuries, pain and suffering, disability, physical impairment, disfigurement, mental anguish, inconvenience and loss of capacity of the enjoyment of life]

b.$ 1,600,000

Total damages of Class Representative Mary Farnan
TOTAL (add lines a & b) $ 2,850,000

b. **What is the total amount of damages sustained by Class Representative Frank Amodeo?**

1. **ECONOMIC DAMAGES** [including medical expense, hospitalization, medical and nursing care in the past or to be obtained in the future; lost earnings and lost ability to earn money in the future; loss of ability to earn money in the past and in the future; and loss of household services]

a.$ 2,081,000

2. **INTANGIBLE DAMAGES** [damages incurred in the past or that will be experienced in the future, including bodily injuries, pain and suffering, disability, physical impairment, disfigurement, mental anguish, inconvenience and loss of capacity of the enjoyment of life]

b.$ 3,750,000

Total damages of Class Representative Frank Amodeo:
TOTAL (add lines a & b) $ 5,831,000

W0503316

Question No. 14

What is the total amount of damages sustained by the Estate of Angie Della Vecchia, deceased, and the statutory survivors, her husband Ralph Della Vecchia and her minor son James?

RALPH DELLA VECCHIA [loss of companionship, loss of protection, and mental pain and suffering, in the past and in the future]

a.$ 1,500,000

JAMES DELLA VECCHIA [loss of parental companionship, instruction, guidance and mental pain and suffering, in the past and in the future]

b.$ 2,000,000

THE ESTATE OF ANGIE DELLA VECCHIA [funeral expenses, medical and hospital expenses and loss of household services]

c.$ 523,000

TOTAL (add lines a ,b & c) $ 4,023,000

In determining the total amount of damages, do not make any reduction because of the comparative fault, if any, of Class Representatives Mary Faman, Frank Amodeo and/or Angie Della Vecchia, deceased. If you found one or more of the Class Representatives at fault to any degree, the Court in entering Judgment will reduce that Class Representative's total amount of damages (100%) by the percentage of fault which you found as chargeable to the Class Representative or decedent.

SO SAY WE ALL, this 7th day of April, 2000.

WV05C3331/

APPENDIX J

COMBINED INITIAL BRIEF OF ALL APPELLANTS OTHER THAN LIGGETT AND BROOKE, No. 3D00-3400 (Fla. App. 3 Dist. filed Nov. 26, 2001) (Excerpt)

V. FEDERAL STATUTES, THE FIRST AMENDMENT, AND FLORIDA LAW BARRED KEY ELEMENTS OF PLAINTIFFS' CLAIMS DURING ALL PHASES OF THE TRIAL

B. Plaintiffs' Attacks On Cigarette Advertising And Promotion Were Barred By The FCLAA, The First Amendment, And Florida Law

1. The FCLAA Preempted Attacks On Cigarette Advertising And Promotion

The Federal Cigarette Labeling and Advertising Act ("FCLAA"), 15 U.S.C. § 1331 *et seq.*, requires cigarette makers to place specific warning labels on all cigarette packages and advertising. Furthermore, it prohibits states from requiring different or additional warnings or imposing any other health-based regulations on cigarette advertising and promotion. The Act's explicit "preemption clause" provides:

> *No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes* the packages of which are labeled in conformity with the provisions of this act.

15 U.S.C. § 1334(b) (emphasis added).[1] The U.S. Supreme Court has held that the FCLAA's preemption clause extends

[1] The FCLAA's preemption clause became effective on July 1, 1969. *See* Pub. L. 91-222, § 3. For convenience, periods or events after that date will be described in this context as "post-1969."

to private actions by smokers. Thus, smokers may not recover damages by asserting that cigarette advertising and promotion are subject to any health-based common-law restrictions. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521-23 (1992) (the FCLAA prohibits state-law suits for damages as well as legislative enactments).

The trial court reacted to preemption under the FCLAA with hostility and confusion:

> To be perfectly honest with you, with all due deference to all of that [the FCLAA], nobody, when they talked about preemption and warnings, had any concept at all about the advances in science, *and so the preemption doesn't apply to modern science and what's happening today.*
>
> *So many things happen today that they [smokers] should be warned about and the government says: Hey, it's enough.* They're doing a tremendous disservice to the public by not allowing warnings, enhancement of warnings, and telling them exactly what's going on.
>
> And to me, I mean *that just . . .*
>
> *[b]oils my blood and boggles my mind.*
>
> . . .
>
> It makes litigation impossible. And this is -- and truth and justice impossible. That's where the problem comes in.
>
> Now, we've got to work around it. *Now, I have to figure out how to get around it, thank you very much, preemption. . . .*

It's so ridiculous. It's really nonsense. (T. 16621-23, emphasis added.)

* * *

I have so much trouble . . . intellectually accepting that concept [preemption]. . . . *Because it is flat-out so wrong in my opinion . . . with all due respect for the Supreme Court.* (T. 32623, emphasis added.)[2]

In its rulings on evidence and instructions, the trial court repeatedly "got around" preemption. Throughout the trial, the court allowed plaintiffs to attack defendants' advertising and promotion on the asserted grounds that defendants had thereby: (1) neutralized package warning labels, (2) failed to provide adequate information about the dangers of smoking, (3) made smoking appear attractive to youth, and (4) improperly aimed cigarette advertising and promotion at African-Americans, other minorities, and women. All such claims were preempted by the FCLAA.

"Neutralization." Plaintiffs asserted in Phase I that defendants' post-1969 cigarette advertising and promotion made smoking seem glamorous and attractive, thereby "neutralizing" the federal warnings and undermining smokers' awareness and appreciation of the risks. (See, e.g., T. 33946-47, 34333-36.) In Phase II-A, plaintiffs repeated such assertions with specific reference to the three named plaintiffs in that phase. (See, e.g., T. 42225-26, 42239, 42363-70, 42383-

[2] This was not the only instance in which the court expressed hostility towards basic legal doctrines. For example, it failed to give proper effect to Florida's hearsay law. (E.g., T. 27590-94, 37648-49.) The court declared that Florida's rules were "crazy" (T. 11481); "we're just pulling the wool over people's eyes and we're hiding the truth" (T. 11484); and the Florida Legislature "goofed" when it enacted the rules (T. 11489). The court even suggested that the hearsay rules "may not be applicable all the time for certain cases." (T. 11480.)

408, 43769-70; R. 242: 54724-841.) Defendants consistently objected that plaintiffs' "neutralization" claims violated the FCLAA; the court overruled their objections. (T. 42304-14, 42363-64, 42383-84, 42394-408, 43719-37, 43755-58, 43769.)

The court's rulings were erroneous. In *Cipollone*, the U.S. Supreme Court held that the FCLAA preempts claims that post-1969 advertising "neutralized" or undermined the federal warnings. Thus, smokers are barred from asserting that advertising "associated cigarette smoking with such positive attributes as contentment, glamour, romance, youth, happiness . . . [or] suggest[ed] that smoking is an activity at least consistent with physical health and well-being." 505 U.S. at 527-28; *see also Da Silva v. American Tobacco Co.*, 667 N.Y.S.2d 653, 656 (N.Y. Sup. Ct. 1997); *American Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 440 (Tex. 1997).

Failure to provide additional information. Plaintiffs asserted in Phase I that, after 1969, defendants had wrongfully failed to provide information about the risks of smoking, beyond the requirements of federal law. (E.g., T. 12185-89, 13464-91, 16400-01, 18709-15, 27957-58, 28888-89, 29263-64, 32621-22.) In Phase II-A, Mr. Amodeo and Ms. Farnan testified about their lack of information both before and after 1969. (T. 40247-51, 41365-75, 41438-42, 42217-18.) In addition, plaintiffs asserted that Philip Morris had acted wrongfully, after purchasing certain brands from Liggett, by removing Liggett's supposedly superior warnings and replacing them with warnings that fully complied with the FCLAA. (E.g., T. 54031-32.) The court repeatedly overruled defendants' objections that such assertions were preempted. (R. 276: 62399-400; T. 12020-21, 12186-89, 16400, 18708-18, 27957-58, 28882-86, 29263, 32622-26, 40249-50, 41373-75, 41438-42.)

Again, the court's rulings were erroneous. In *Cipollone*, the Supreme Court held that the FCLAA bars claims that cigarette makers should have provided information about

the risks of smoking beyond the requirements of federal law. 505 U.S. at 521-23; *see also Small v. Lorillard Tobacco Co.*, 679 N.Y.S.2d 593, 603 (App. Div. 1998) ("the [FCLAA] preempts all claims by consumers that the tobacco companies failed to disclose information to the public beyond what was required by federal law"), *aff'd*, 720 N.E.2d 892 (N.Y. 1999).[3]

"Youth marketing." Plaintiffs also attacked defendants' advertising as appealing and attractive to youth. (E.g., T. 16360-61, 16384-87.) Defendants objected to plaintiffs' "youth marketing" claims as preempted by the FCLAA. (E.g., T. 17589-605, R: 178: 41367-413.) The court initially agreed that such claims were preempted. (T. 5165.) Indeed, the court cut off jury voir dire on this issue because it could not "conceive of how you're going to get teenage smoking into this case if you're going to have a preemption on advertising." (T. 5165.) However, the court later changed its mind and, over defendants' objections, allowed plaintiffs to make "youth marketing" claims throughout the trial. (E.g., T. 10480, 10915-16, 11376-77, 13453, 15882-87, 16871-81, 16900, 17131-54, 17210, 17263-65, 24296-331, 51683; R. 189: 43567-97; R. 205: 47096-99; R.206: 47320-30, 47410-11.)

For example, plaintiffs' first witness in Phase I told the jury that sexy models in advertising have an impact on 13-, 14-, or 15-year olds who think smoking looks cool. (T. 11376-77.) Another witness testified that one out of three children start smoking because of advertising. (T. 13453.) Another witness testified that cigarette advertising is "an important influence in adolescent smoking initiation," because

[3] The FCLAA prohibits such claims even where, as here, plaintiffs couch them in the language of "fraudulent concealment" rather than "failure to warn." *See, e.g., Glassner v. R. J. Reynolds Tobacco Co.*, 223 F.3d 343, 349 (6th Cir. 2000); *Allgood v. R.J. Reynolds Tobacco Co.*, 80 F.3d 168, 171 (5th Cir. 1996); *American Tobacco v. Grinnell*, 951 S.W.2d at 439-40.

"advertising portrays these very attractive images of what it's like to be a smoker," using "attractive," "healthy," "vigorous" people who seem to be having fun. (T. 17210, 17264-65; see also T. 11377-78.) Plaintiffs' counsel then made "youth marketing" a focal point of his closing arguments in both Phase I and Phase II-B, urging the jury to punish defendants because cigarette advertising had an attractive effect on youth. (E.g., T. 37508, 57149-57, 57177.)

The trial court's decision to allow plaintiffs' "youth marketing" claims was plainly erroneous. In *Lorillard v. Reilly*, 121 S. Ct. at 2430, the Supreme Court confirmed that the FCLAA bars assertions that cigarette advertising is wrongful because it may appeal to youth. The Court stated: "Congress enacted a comprehensive scheme to address cigarette smoking and health in advertising and pre-empted state regulation of cigarette advertising that attempts to address that same concern, *even with respect to youth*." *Id.* (emphasis added). Regulation of the entire area is committed exclusively to the federal government:

> In the 1969 amendments [to the FCLAA], Congress not only enhanced its scheme to warn the public about the hazards of cigarette smoking, but also sought to protect the public, *including youth*, from being inundated with images of cigarette smoking in advertising. In pursuit of the latter goal, Congress banned electronic media advertising of cigarettes. And to the extent that Congress contemplated additional targeted regulation of cigarette advertising, it vested that authority in the FTC.
>
> * * *
>
> [W]e fail to see how the FCLAA and its pre-emption provision permit a distinction be-

> tween the specific concern about minors and cigarette advertising and the more general concern about smoking and health in cigarette advertising, especially in light of the fact that Congress crafted a legislative solution for those very concerns.

Id. at 2418-19 (emphasis added). *Reilly* confirms that the trial court's position on "youth marketing" was legally erroneous. The resulting prejudice to defendants is manifest.

Marketing to minorities and women. Plaintiffs also asserted that defendants' post-1969 advertising was wrongful because it appealed to African-Americans, other minority groups, and women. (Many of plaintiffs' racial arguments have already been discussed in Point II.A above.) For example, one of plaintiffs' witnesses charged that defendants' advertising had "perpetuated" the "racial segregation" of America through the 1970's and 1980's. (T. 17034-35.)

The court erroneously admitted plaintiffs' "minority marketing" evidence over defendants' objections. (T. 11729-32, 16871-81, 16907-09, 17113-19.) The court ultimately ruled that "minority marketing" was relevant not because it was an element of any cause of action in the case, but because "the industry had steadfastly denied" engaging in such marketing, and therefore it was relevant to defendants' "credibility." (R. 206: 47410-11.) The court thus ignored the fact that defendants had *never denied* engaging in marketing to minorities. In fact, defendants had freely acknowledged that they tailored their advertising to minorities, women, and other segments of the adult consuming public. (T. 15867, 18464, 33835.) The evidence showed that this was a common and accepted practice among consumer-products industries. (T. 33794-95, 33829-35, 33839-40.) The court's conclusion also ran afoul of the settled rule that a party cannot elicit an opponent's statement on a collateral matter and then introduce contradictory evidence to impeach the opponent's

credibility. *See, e.g., Gelabert v. State*, 407 So. 2d 1007 (Fla. 5th DCA 1981).

In any event, the FCLAA preempts claims that advertising appealed to minorities and women, just as it preempts claims that advertising appealed to youth. *Cf. Lorillard v. Reilly*, 121 S. Ct. at 2430; *Brown v. Philip Morris, Inc.*, 250 F.3d 789, 798 (3d Cir. 2001) (FCLAA preempted claims that cigarette advertising improperly "targeted" African-Americans). The court's refusal to bar all such claims was reversible error.

Punitive damages. Plaintiffs told the jury that defendants' advertising warranted punitive as well as compensatory damages. Theatrically displaying (again) samples of defendants' advertising, plaintiffs' counsel urged the jury to return an astronomical punitive award on the ground that such advertising was attractive to youth, minorities, and women. (E.g., T. 57093-95, 57106-16, 57149-57, 57177; see also T. 51901-07.) Defendants argued that such assertions with respect to punitive damages were preempted by the FCLAA. (T. 51873, 51889-90; R. 285: 64368-71.) The court ruled that FCLAA preemption was irrelevant to punitive damages and therefore refused to apply preemption *at all* in Phase II-B. (R. 276: 62399-400.)

The court's ruling was patently erroneous. Like liability and compensatory damages, *see Cipollone*, 505 U.S. at 521, punitive damages function as a regulation or prohibition of the conduct that is punished. Indeed, a basic purpose of punitive damages is *deterrence* -- the regulation of behavior.[4] By failing to apply the FCLAA in Phase II-B, the court left the jury free to punish and hence regulate advertising and

---

[4] *See, e.g., W.R. Grace*, 638 So. 2d at 504 (deterring misconduct is a primary function of punitive damages); *St. Regis Paper*, 428 So. 2d at 248; *Perez v. Z Frank Oldsmobile, Inc.*, 223 F.3d 617, 621 (7th Cir. 2000) (deterrence "is a principal justification of punitive damages"), *cert. denied*, 121 S. Ct. 1099 (2001).

promotional activity that was subject solely to -- and fully compliant with -- federal regulation.

Erroneous jury instructions. In some cases, jury instructions may cure the error of admitting evidence barred by the FCLAA. *See Carter v. Brown & Williamson*, 778 So. 2d at 941-42. In this case, however, there was no such cure. To the contrary, the court's jury instructions only made matters worse.

At the close of Phase I, defendants requested an instruction that correctly stated the effect of the FCLAA, including the following:

> Congress also provided that, as long as the packs of cigarettes bear the federally mandated warning, cigarette advertising, from July 1, 1969, forward cannot be the subject of any claim that the advertising *undermined or neutralized* the warnings or made them less effective . . . . The plaintiffs have also claimed that defendants' advertisements and promotions were intended to encourage *young people, members of ethnic minority groups, or others* to start smoking. . . . . I hereby instruct you to ignore any such claims or suggestions or evidence regarding any of these activities after July 1, 1969. (R. 214: 49274-75, emphasis added.)

The court rejected defendants' request. Instead, it gave an instruction that misstated the law, contradicted itself, and said nothing about neutralization or about marketing to youth, minorities, or women:

> [P]ursuant to federal law, you may not base any finding of liability on a determination that after July 1 of 1969, one or more of these defendants should have included additional or more clearly stated warnings on their cigarette

> packages or in their advertisements. *However, federal law does not limit the liability of any defendant against claims based on negligence, strict liability, express warranty, fraud, misrepresentation, or conspiracy.* (T. 37569-70, emphasis added.)

The court's instruction was erroneous. There are no hard-and-fast categories of claims to which the FCLAA does or does not apply. *Cipollone*, 505 U.S. at 523. Plaintiffs cannot evade preemption by re-labeling their claims. The central question remains "whether the legal duty that is the predicate of the common-law damages action constitutes a 'requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion.'" *Id.* at 524; *see also Lacey v. Lorillard Tobacco Co.*, 956 F. Supp. 956, 963 (N.D. Ala. 1997) ("Regardless of the label attached to it, a plaintiff's claim based upon an alleged duty of defendants to provide to consumers more information regarding smoking and health than is required by the Labeling Act is preempted").

Under that test, the categories of claims that the court excluded from preemption -- "negligence, strict liability, express warranty, fraud, misrepresentation, or conspiracy" -- were subject to preemption to the same extent as plaintiffs' other claims. The court's instruction improperly allowed plaintiffs to sidestep preemption by re-labeling their attacks on cigarette advertising and promotion as "negligence," or "fraud," or the marketing of a "defective product." *See, e.g., Glassner*, 223 F.3d at 349; *Allgood*, 80 F.3d at 171; *American Tobacco v. Grinnell*, 951 S.W.2d at 439-40.

In addition, the court's instruction was prejudicially confusing. The italicized sentence in the instruction quoted above took away from defendants what the immediately preceding sentence had given. The instruction was erroneous for that reason alone. *See Jacobs*, 766 So. 2d at 1180; *Gonzalez*, 752 So. 2d at 39.

The court repeated and amplified its error in subsequent phases of the trial. In its Phase II-A instruction, the court again told the jury that preemption has no application to claims for "negligence, strict liability, express warranty, fraud and misrepresentation, or conspiracy." (T. 50253-54.) Furthermore, the Phase I instruction had already inflicted prejudice that *could not be cured* in subsequent phases. In Phase II-A, the jury was required simply to apply its general Phase I verdict concerning defendants' conduct to the particular circumstances of the three individual plaintiffs. (T. 50236.) And in Phase II-B, the court refused to give any preemption instruction at all. (R. 285: 64368-71; R. 287: 64650-64; see also T. 56617-20.) Thus, the damage done in Phase I was perpetuated and irreparable.

APPENDIX K

BRIEF ON THE MERITS OF ALL RESPONDENTS OTHER THAN LIGGETT AND BROOKE, No. SC03-1856 (Fla. filed July 16, 2004) (Excerpt)

II. The Third District Correctly Invalidated The Trial Plan

C. The Verdict Was Improperly Generalized

The Third District identified yet another trial-plan defect: "[T]here were no specific findings as to any act by any defendant at any period of time. The trial plan enabled the plaintiffs to try fifty years of alleged misconduct that they never would have been able to introduce in an individual trial, which was untethered to any individual plaintiff." 853 So. 2d at 467 n.48. In Phase I, plaintiffs "stitch[ed] together" a "fictional composite" -- a generalized, "perfect plaintiff" -- supplanting all real class members, whose knowledge, conduct, and other circumstances varied crucially. Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331, 344-45 (4th Cir. 1998). This fictional smoker knew nothing about the risks of smoking, relied on every alleged misstatement or omission over the course of nearly half a century, smoked every cigarette brand sold at any time during that period, and developed every disease attributable to smoking. Use of generalized "findings" based on such evidence, for any purpose, violates not only Florida's class-action rules (see Point I above) but also Florida tort law and state and federal due process.

Moreover, the generalized verdict is useless in the trial plan's final phase -- the necessary Phase III trials of individual class members' claims before separate juries. No Phase III jury (or judge) can identify whatever misstatement(s) or omission(s) the Phase I jury found to be unlawful. Thus, the trial plan violates due process by allowing boundless "re-examination" of the Phase I verdict: Phase III juries are free to hold defendants liable for conduct that the Phase I

jury may never have considered unlawful, much less punishable. See Blyden v. Mancusi, 186 F.3d 252, 257, 268-69 (2d Cir. 1999); Henley v. FMC Corp., 2001 WL 733110, at *8 (4th Cir. June 29, 2001).[1] In that respect, the trial plan also violates defendants' jury-trial right under the Florida Constitution, which is commensurate with the jury-trial right under the U.S. Constitution.[2]

The only "alternative" to re-examination is equally improper: an irrebuttable presumption that the Phase I jury found unlawful all of defendants' conduct over nearly half a century. See Agency for Health Care, 678 So. 2d at 1254 (irrebuttable presumption of liability element is unconstitutional). That was the "solution" reached in the first (and so far, only) purported "Phase III trial," Lukacs v. Brown & Williamson Tobacco Corp., No. 01-03822 (Fla. 11th Jud. Cir. 2001). (The Lukacs plaintiffs have filed an amicus brief supporting plaintiffs here.) Mr. Lukacs claimed reliance on two or three advertisements in the 1940s and 50s, but he offered no proof of their falsity or fraudulent intent. Instead, he asserted that such matters were fully established by the Engle Phase I verdict. The Lukacs trial judge reviewed that verdict and asked: "What's the false statement [found in Engle]?" When the judge was informed that no one can answer that question, she declared as "law of the case" that all "cigarette advertising is false and misleading." (RA3:36, at 2009-14, 2279-84, 2308-09.) That absurd and fundamentally unfair result is the consequence of attempting to apply the Phase I

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[1] See also Rowlands v. Signal Constr. Co., 549 So. 2d 1380, 1383 (Fla. 1989); Alabama v. Blue Bird Body Co., 573 F.2d 309, 318 (5th Cir. 1978). Defendants unsuccessfully sought the necessary specificity in the Phase I verdict form. (R215:49493-532, RA1:14; R304:69349-60, RA1:15; T35915-16, 35952-54, 35967-71, 36298-300.)

[2] See In re Forfeiture of 1978 Chevrolet Van, 493 So. 2d 433, 434-35 (Fla. 1986); Castano, 84 F.3d at 750-51; In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1302-03 (7th Cir. 1995).

verdict to any Phase III issue. The Phase I verdict cannot be salvaged for any purpose.[3]

* * *

VII. Numerous Other Errors Not Addressed By The Third District Also Required Reversal

The Third District did not address numerous other issues raised on appeal, each of which also required reversal. For example, the trial court improperly allowed plaintiffs to assert claims preempted by federal law. (RA3:28, at 132-43; RA3:30, at 75-79.) The trial court also improperly allowed the jury to impose liability and punishment for conduct protected by the First Amendment and the Noerr-Pennington doctrine. (RA3:28, at 125-31, 143-49; RA3:30, at 79-80.) These and other errors provide additional, alternative grounds for approval of the Third District's ruling (or would require further proceedings upon remand).[35]

[35] Other issues raised on appeal but not addressed by the Third District included: (1) the trial court improperly entered a "final judgment" even though judicial labor was incomplete (Phase III had not even begun); (2) the Phase I jury instruction on "materiality" was defective; (3) the Phase I jury instruction on "scientific causation" was defective; (4) the Phase I verdict form question concerning "fraudulent concealment" was defective; (5) the trial court's failure to dismiss the "emotional distress" claim was erroneous; (6) the trial court's admission of privileged documents was erroneous; (7) plaintiffs' counsel improperly referred to defendants' non-party affiliates as potential sources of payment; and (8) the trial court erroneously failed to instruct the jury on a class cut-off date and on the need to avoid punishing lawful conduct. (RA3:28, at 53-55, 69-86, 104-06, 125-31, 141-49; RA3:30, at 33-34, 41-49, 64-65, 70-73.

[3] In addition, improper class certification, attorney misconduct, and other errors taint the Phase I verdict (and thus the Phase II-A and II-B verdicts as well).

APPENDIX L

**Reply Brief of Petitioners,
Florida Engle Class, On The Merits,
No. SC03-1856 (Fla. filed Aug. 16, 2004)
(Excerpt, p. 7 n.3) (emphasis in original)**

The verdict form was not a basis for reversal and is not reviewable here. Provident Management Corp. v. City of Treasure Island, 718 So. 2d 738, 740 (Fla. 1998). Defendants challenge the "generalized" question on entitlement to punitive damages but fail to reveal that Tobacco authored and defended that question: "That's not a meaningless question. . . [I]f the answer is no, not a single Florida . . . injured smoker in this Class can ever recover punitive damages from any of the defendants in this courtroom." T.36004-05; 36012-13. Defendants agreed to the verdict form with 242 subparts as a preferred "middle ground" over Class' interrogatory questions on fraud and conspiracy T.35950-51; 35967-69; A.6 pp. 110-120.

APPENDIX M

RESPONDENTS' MOTION FOR REHEARING, No. SC03-1856 (Fla., filed Aug. 7, 2006) (Excerpt)

III. Unresolved Appellate Issues Remain To Be Addressed By The Third District (And Potentially By This Court)

Defendants raised numerous issues on appeal that were left unresolved by the Third District because that court reversed the judgment on other grounds. (See Defendants' Merits Brief at 49-50 & n.35; id. Appendix Vol. 3, Tab 28, at 53-55, 69-86, 104-06, 125-49; id. Appendix Vol. 3, Tab 30, at 33-34, 41-49, 64-65, 70-73, 75-80.) Those issues stand as independent reasons why the preserved Phase I findings cannot be applied (and, in addition, why judgment cannot be entered for Farnan and Della Vecchia). Defendants submit that the Court may have overlooked or misapprehended those issues. For example, defendants argued in the Third District that the trial violated federal preemption, which, among other things, forecloses the possibility of interpreting the "defect" findings as meaning that all cigarettes are defective. Defendants ask the Court to clarify that on remand the Third District may consider and decide all remaining unresolved issues.[1] Alternatively, if this Court has itself considered and

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[1] See, e.g., Commission on Ethics v. Barker, 677 So. 2d 254, 257 (Fla. 1996) ("we remand the case for the determination of [an unadressed issue]"); State v. Nordstrom, 613 So. 2d 437, 441 (Fla. 1993) (remanding to the district court "with directions to consider the other issues raised in the initial appeal"); see also Rosen v. FIGA, 802 So. 2d 291, 295 n.6, 298 (Fla. 2001) ("On remand, any issues previously raised by the parties before the First District but left unresolved by our decision may be addressed"); Lexington Insurance Co. v. Simkins, 704 So. 2d 1384, 1386 (Fla. 1998) ("On remand, any issues previously raised but left unresolved can be addressed"); Provident Management Corp. v. City of Treasure Island, 718 So. 2d 738, 740 (Fla. 1998) ("On re-

rejected defendants' arguments on those issues, defendants respectfully ask the Court to state that it has done so.

---

mand, any issues previously raised but left unresolved can be addressed").

APPENDIX N

Certain Defendants' Motion Regarding Proceedings On Remand, No. 3D00-3400 (Fla. App. 3 Dist. filed Jan. 12, 2007) (Excerpt)

Previously Unaddressed Issues Must Now Be Decided As A Result Of The Florida Supreme Court's Opinion.

4. The additional points of error raised but not yet addressed in this Court are independent grounds for reversing the judgment in its entirety, and they remain unaffected by the Supreme Court's decision. As shown by the examples provided below, if those points of error are correct, then the Farnan and Della Vecchia awards may not be reinstated and the Phase I findings may not be accorded any "res judicata effect."

5. For instance, this Court has not yet ruled on defendants' arguments that the trial court misapplied federal law (preemption and the First Amendment) throughout this case, and that the trial court violated Florida law in framing jury instructions and verdict form questions on "causation," "materiality," and "concealment" – errors that invalidate the Farnan and Della Vecchia awards and the Phase I findings. Nor has this Court yet ruled on defendants' argument that the trial court incorrectly failed to dismiss the claim of intentional infliction of emotional distress – an additional error that invalidates the Farnan and Della Vecchia awards.[1] (See Combined Initial Brief at 69-86, 132-49; Consolidated Answer Brief at 134-49, 233-46; Combined Reply Brief at 40-49, 75-8.

[1] The Supreme Court ruled that the Phase I findings as to intentional infliction of emotional distress could not be applied in any individual actions by class members under principles of res judicata. Slip op. at 4. However, the Supreme Court did not address whether the emotional distress claim should have been dismissed as to plaintiffs Farnan and Della Vecchia under principles of substantive Florida tort law.

MOTION FILED

AUG 15 2007

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No. 06-1545

IN THE

Supreme Court of the United States

R.J. REYNOLDS TOBACCO CO., *ET AL.*,
Petitioners,

v.

HOWARD A. ENGLE, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Florida

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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No. 06-1545

IN THE

Supreme Court of the United States

R.J. REYNOLDS TOBACCO CO., *ET AL.*,
Petitioners,

v.

HOWARD A. ENGLE, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

MOTION FOR LEAVE TO FILE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Chamber of Commerce of the United States of America (the "Chamber") hereby moves this Court, pursuant to Rule 37.2, for leave to file the attached brief *amicus curiae* in support of the petition for a writ of certiorari in this case.* Petitioners have consented to the filing of this brief, and correspondence reflecting petitioners' consent has been lodged with the Clerk. Respondents, however, would not provide consent except on conditions unacceptable to the Chamber.

The Chamber is the world's largest federation of business companies and associations, with an underlying mem-

* The attached brief addresses only petitioners' first question presented. The Chamber also supports review with respect to the second question.

bership of more than three million business and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of national concern to American business.

The Chamber and its members have a strong interest in seeking review of the Supreme Court of Florida's decision in this matter, which accorded preclusive effect to generic findings of wrongdoing covering an entire industry over a half-century, under the rubric of "issues" classes. The decision below threatens the ability of automobile, healthcare, chemical, and numerous other companies to exercise their due process rights to defend themselves against potentially bankrupting class action and mass tort judgments.

Given the profound effect the decision below will have on the Chamber's members absent review, the Chamber requests leave to file an *amicus* brief in support of petitioners.

Respectfully submitted,

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Chamber of Commerce of the United States of America ("the Chamber") respectfully submits this brief as *amicus curiae* in support of petitioners.[1]

STATEMENT

This case involves a question of exceptional importance to the business community: whether courts facing class actions or mass tort proceedings may permissibly conduct "generic" product liability trials and then afford preclusive effect to generalized findings of wrongful conduct in separate cases brought by individual plaintiffs with disparate claims.

This case was tried as a class action involving as many as 700,000 current and former smokers asserting various personal-injury claims against members of the tobacco industry. The trial involved numerous products and a half-century's worth of conduct by many defendants. The trial court justified its trial plan on the grounds that the jury was capable of deciding purportedly "common" questions applicable to the class as a whole. Yet the trial had virtually nothing to do with conduct "common" to *all* (or even most) of the 700,000 class members' claims. The court did not require *any* of the evidence it allowed plaintiffs to present to the jury to be linked to the circumstances of any particular named plaintiff or absent class member—let alone ensure that the evidence was relevant to the claims of *all* of those class members. A myth of commonality was instead created on the theory that all of the claims were "smoking-related," and that myth was

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[1] Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part. No person or entity, other than the Chamber and its members, made a monetary contribution to the preparation and submission of this brief.

supported by including such a wide swath of conduct that many of the class members could link their claims to *some* piece of evidence introduced, even though no single act of alleged wrongdoing was, or could be, shown to have affected all or even most of the class members.

At the conclusion of the generic phase, the jury decided numerous abstract questions, including, for example, whether the defendants were "negligent." Faced essentially with a thumbs-up, thumbs-down vote on a half-century of conduct by an entire industry (and apparently asked only to find one, undefined, act of "negligence" per defendant over the class period), the jury sided with plaintiffs. The intermediate appellate court reversed the judgment and ordered the class decertified. The Supreme Court of Florida (the "Florida Supreme Court"), however, reinstated much of the judgment by adopting the "pragmatic solution" of prospectively decertifying the class while conferring upon most of the generic jury findings "res judicata effect" in any future lawsuit filed by *any* class member—rendering the prospective decertification meaningless.

SUMMARY OF ARGUMENT

The Florida Supreme Court's decision in this case illustrates a growing and alarming trend among courts to respond to mass tort litigation by authorizing "generic" trials involving disparate claims, thereby permitting a single jury answering a few abstract questions to resolve whether multiple defendants breached tort duties to hundreds or thousands (or, as here, hundreds *of* thousands) of plaintiffs all at the same time. The court below held that the jury's comparatively contentless findings of wrongdoing concerning conduct spanning an entire industry over more than a half-century were entitled to preclusive effect as to the claims of as many as 700,000 personal-injury plaintiffs who could allege only that *different* acts by *different* defendants breached *different* tort duties to *different* people at *different* times causing *dif-*

ferent injuries. The Florida Supreme Court's decision departs sharply from traditional norms of fair adjudication, elevates expediency above due process, and places businesses in peril of being coerced into global settlements—even where they have no actual liability. The Court should grant review.

1. Declining to evaluate its decision under traditional notions of fairness, the court below termed its ruling a "pragmatic solution." But even if pragmatism could otherwise justify such a sharp departure from due process (and it cannot, as we explain below), the decision below is neither pragmatic nor a "solution" to any problems associated with mass tort litigation. On the contrary, it exacerbates those problems by encouraging attorneys to file marginal or even frivolous claims in a mass tort proceeding on the hopes that, if enough claims are filed, it will then become permissible for trial courts to ignore the traditional dictates of due process by approving mass trials involving thousands of plaintiffs and numerous defendants. The prospect of such mass trials will effectively require most or all defendants, facing pressure from the financial markets, to settle all claims, regardless of merit. The result of the decision below is therefore more (not less) litigation, as well as an enormous cost to both American business and the principles of due process of law.

2. Unfortunately, although the procedure employed below represents a sharp departure from traditional notions of fair adjudication, it is by no means unique in the modern mass tort era. Recent years have seen a growing trend in lower courts of adopting "generic" proceedings to resolve disparate issues related to disparate claims. Because the settlement pressure such proceedings create typically means that all claims are settled prior to trial, this case presents a rare opportunity for the Court to provide much needed post-trial guidance on the constitutional limits imposed on class actions and mass tort proceedings. This Court has already

carefully mapped out those limits in the context of class action settlements and class action notices. The time has come for the Court to articulate the limits due process imposes on analogous cases that are actually litigated to trial.

3. The importance and frequency of the question presented is enough to warrant review. But the decision below is also wildly incorrect on the merits. The "generic" product liability trial proceeding employed below, involving thousands of plaintiffs asserting inherently individualized and disparate personal-injury claims, violated due process in at least two distinct ways. *First*, it permitted plaintiffs to litigate not on the merits of their own concrete claims, but through an imaginary "perfect plaintiff" that had been affected by each alleged act of misconduct, even though no such person actually exists. *Second*, by conflating the conduct of numerous defendants, it prevented any particular defendant from adequately defending itself.

Although any generic trial involving the disparate claims of personal-injury plaintiffs raises these concerns, the decision below brings them into sharp focus. That decision holds that generic findings, unconnected to the claims of any particular plaintiff, are to be accorded preclusive effect so that subsequent plaintiffs can use those findings to show that the defendants breached tort duties as to them. In affording preclusive effect to certain findings in this case, the Florida Supreme Court implicitly rejected the defendants' argument that the generic verdict cannot be preclusive in a future lawsuit brought by a particular plaintiff because it is impossible to know whether the prior jury based its verdict on evidence having *anything* to do with any identifiable plaintiff—or, indeed, whether the original jury may have *exonerated* the petitioners as to any particular conduct.

In addition to the arguments made in the petition, the Florida Supreme Court's decision to afford preclusive effect to the jury verdict threatens due process for at least three

other, related reasons. *First*, future juries will have no reasoned basis for properly apportioning fault, and will thus be left to arbitrarily guess at how to do so under Florida's pure comparative fault regime. *Second*, by declaring *prospectively* that preclusive effect will be accorded to generic findings, the court below departed from the traditional practice of permitting the second court—the court aware of the facts of both cases—to decide whether the issues of the second case were decided in the first case. In so doing, the court sought to ensure that facts will be established by estoppel without any case-specific inquiry into whether estoppel is appropriate under a concrete set of facts. *Third*, because the Florida Supreme Court recognized that the case was not fairly tried as a class action, decertifying the class also should have led to vacating the verdict. Instead, the court adopted a course that is functionally indistinguishable from approving class certification.

ARGUMENT

As the petition explains, the generic product liability proceeding adopted below—both in itself and as applied prospectively to future lawsuits—sharply deviates from traditional modes of fair adjudication and deprives petitioners of their due process right to fairly defend themselves. The Court should take this opportunity to provide much needed guidance regarding the due process limits of generic product liability trials.

I. THE DECISION BELOW WILL STRAIN COURTS AND HARM BUSINESSES.

The decision below relies on the premise that a "pragmatic" solution was needed to the problem of tobacco litigation in Florida state courts. As we explain below, that is not the proper benchmark when fundamental constitutional rights are at stake. But even if it were, the court's pragmatism is fundamentally misguided. Far from solving the problems associated with mass-tort litigation, the decision below

is an invitation to abuse. More lawsuits, more procedural shortcuts, and more harms to American businesses inevitably flow from the decision below.[2] In particular, the decision below ensures that lawyers will have incentives to file meritless claims—indeed, even potentially to create meritless mass tort *proceedings*—in order to overrun a court system, thereby justifying a "pragmatic" mass trial deciding in one fell swoop the liability of an entire industry with respect to thousands of claimants.

It is now well understood that the stakes involved when mass litigation is consolidated for joint resolution at trial place defendants under intense pressure to settle even baseless claims. *See, e.g., Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low."); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, J.) (recognizing that applying adverse "generic liability" verdict as to all plaintiffs would require defendant to settle all outstanding claims, even though defendant had previously won twelve of thirteen individual lawsuits); Fed. R. Civ. P. 23 advisory committee notes ("An order granting certification [of a class] . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability."); Lester Brickman, *Lawyers' Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation*, 26 Wm. & Mary Envtl. L. &. Pol'y Rev. 243, 252 (2001) ("the aggregation of claims often pressures a defendant or defendants to settle claims irrespective of their merits"); Richard O. Faulk et al., *Building a Better Mousetrap? A New Approach to Trying Mass Tort*

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[2] Although the court purported to limits its "pragmatic" solution to the "unique" "procedural posture" of the case below (*see* Pet. App. at 30a-31a), no reasoning in the decision below cabins its effects to tobacco litigation alone.

Cases, 29 Tex. Tech L. Rev. 779, 790 (1998) (same).

The consolidation of claims against multiple defendants only compounds that pressure by creating a "rush to settle" through "a classic prisoners' dilemma[.] Although defendants realize that they should bargain as a group with plaintiffs' counsel, each defendant also understands that it can gain an advantage by settling early, and that it will be disadvantaged if others settle first (the sucker's payoff)." *See Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the House Comm. on the Judiciary*, 106th Cong. 89, 99 (prepared statement of William N. Eskridge, Jr., Professor, Yale Law School).

Plaintiffs' lawyers, well aware of the phenomenon just explained, will read the decision below to hold that every new claim added to a mass proceeding makes the prospect of a generic trial not only more risky for the defendants, but also more attractive to a court. As these lawyers will recognize, the combination of vastly increased liability exposure and diminishing rights will often overwhelm a defendant into settling all claims asserted against it. Claims that could never survive on their own are thus carried along by their parasitic attachment to generic product liability proceedings. The result is more lawsuits, more judicial costs, and more extorted settlements, straining the courts and unsettling American business. Given the importance of the question presented, the Court should grant review.

II. THE PETITION PRESENTS A RARE OPPORTUNITY FOR THIS COURT TO PROVIDE MUCH NEEDED GUIDANCE ON A GROWING ISSUE.

1. Unfortunately, the decision below is not the only recent example of a trial court adopting a "generic" product liability trial as a "pragmatic solution" to a class action or other mass tort proceeding. Rather, there is a growing trend to attempt mass tort aggregation through generic trial pro-

ceedings involving disparate claims related to similar products. *See, e.g.*, *Scott v. Am. Tobacco Co., Inc*, 949 So. 2d 1266 (La. Ct. App. 2007) (smokers' class action); *Ex parte Flexible Prods. Co.*, 915 So. 2d 34 (Ala. 2005) (approving plan for generic product liability trial in product liability litigation); *State ex rel. Mobil Corp. v. Gaughan*, 563 S.E.2d 419 (W. Va. 2002) (approving consolidation of thousands of asbestos plaintiffs for generic product liability determinations); *Ex parte Monsanto Co.*, 794 So. 2d 350, 357 (Ala. 2001) (finding "no abuse of discretion [and] no basis for issuing a writ of mandamus" where trial judge intended to "hear, at one proceeding, the evidence relating to liability issues as to all claims and then, if the liability issue was decided adversely to Monsanto, to try each individual plaintiff's causation and damages issues"); *State ex rel. Appalachian Power Co. v. MacQueen*, 479 S.E.2d 300, 305 (W. Va. 1996) (approving plan to consolidate thousands of asbestos claims into two-phase trial where first phase would adjudicate general negligence questions); *ACandS, Inc. v. Godwin*, 667 A.2d 116, 120 (Md. 1995) (approving phased trial plan that determined whether each of six asbestos defendants "was negligent and/or strictly liable" and applied finding to individual claims by 8,549 plaintiffs); *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 475 (5th Cir. 1986) (approving class trial of thousands of asbestos cases to determine common issues regarding state of the art defense); *Cimino v. Raymark Indus., Inc.*, 739 F. Supp. 328, 330 (E.D. Tex. 1990) (approving class trial against numerous defendants on issues of product defectiveness and punitive damages); *Wilson v. Johns-Manville Sales Corp.*, 107 F.R.D. 250, 253 (S.D. Tex. 1985) (approving consolidated trial of "50 pending asbestos cases by conducting a single consolidated trial on the issues of product defectiveness and punitive damages").

Reported decisions, moreover, do not remotely tell the whole story; aggregated proceedings that induce global set-

tlements are far more often unreported and, frequently, never appealed. *See generally* John H. Beisner et al., *One Small Step for a County Court . . . One Giant Calamity for the National Legal System*, Civ. Just. Rep. (Apr. 2003) (discussing nationwide trend of aggregating claims of unrelated plaintiffs into mass actions). If this Court denies certiorari, for example, petitioners will be forced to return to the trial courts in Florida, where they will face up to 700,000 claimants armed with generalized findings that the petitioners engaged in malfeasance. The pressure will be immense to settle before that army of claimants is unleashed.[3] Under these circumstances, the Court's immediate review is not only appropriate, it is necessary.

2. Without question, the explosion of mass torts in recent decades has strained America's courts. Facing hundreds or thousands of claims involving the same or similar products, courts have experimented with different litigation models. Ultimately, however, those experiments must pass the test of fundamental fairness. This Court has held consistently that the burdens of aggregate litigation do not alter the requirement of individual justice. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 816-17 (1999) (reversing certification of settlement class, in part, due to conflict among class members that precluded adequate representation); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-28 (1997) (same); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821 (1985) (constitutional choice-of-law calculus not altered by difficulty of adjudicating large number of cases). Nevertheless, the Court has not applied those principles to a litigated class action or a mass tort proceeding. This case presents an ideal vehicle for doing so. The Court should grant review.

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[3] Alternatively, if petitioners decide to litigate those claims, then the courts will be saddled with thousands of lawsuits, each of which will be vulnerable to a future ruling by this Court invalidating the generic liability proceeding. (*See* Pet. at 18-19.)

III. THE IRREGULAR PROCEDURE ADOPTED BELOW DENIES PETITIONERS THE OPPORTUNITY TO DEFEND THEMSELVES.

The Florida Supreme Court adopted two unusual procedures, each of which deprived petitioners of their due process rights. *First*, the court blessed a plaintiff-free, generic product liability proceeding in which individual defendants were put to task for the conduct of their entire industry over the course of a half-century. *Second*, the court permitted subsequent plaintiffs to rely on generic misconduct findings, the bases of which can only guessed at, to establish that each of the petitioners breached duties and committed wrongs as to *them*. Both of these procedures stripped petitioners of the opportunity to fairly defend themselves.

A. The Generic Wrongdoing Trial Employed Below Contravenes Due Process.

The generic product liability trial approved below violates petitioners' due process rights for at least two reasons.[4]

1. First, the sprawling proceeding permitted plaintiffs to piece together a fictitious "perfect plaintiff" who was exposed to both every product and every instance of "misleading" conduct. Evidence was admitted in the generic proceeding without any showing that it could be linked to the circumstances of any particular class member—let alone all class members. Nor did the trial court even require the evidence to be linked to the facts of the *named* plaintiffs' cases. Each class member's allegation that he or she sustained a *particular* injury from smoking a *specific* type of cigarettes at a *discrete* period of time was thus lost in the shuffle. In-

[4] The constitutionality of the trial procedures is necessarily linked to the Florida Supreme Court's preclusion ruling because, as this Court has recognized, a "State may not grant preclusive effect in its own courts to a constitutionally infirm judgment." *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 482 (1982).

stead, the jury was presented with a Frankenstein's plaintiff who saw every allegedly misleading advertisement, smoked every brand of cigarettes over the entire class period, and sustained every imaginable injury, but was nonetheless unaware that cigarette smoking might carry any potential side effects.

As the Fourth Circuit has aptly observed, plaintiffs in such an unbounded proceeding

> enjoy[] the practical advantage of being able to litigate not on behalf of themselves but on behalf of a "perfect plaintiff" pieced together for litigation. Plaintiffs [are] allowed to draw on the most dramatic alleged misrepresentations . . . with no proof that those "misrepresentations" reached them. And plaintiffs [are] allowed to stitch together the strongest . . . case based on language from various [documents], with no necessary connection to their own . . . rights.

Broussard v. Meineke Disc. Muffler Shops, Inc., 155 F.3d 331, 344 (4th Cir. 1998).

Due process simply does not permit litigation through imaginary surrogates; it instead mandates that each claim be evaluated on the actual underlying facts. *See, e.g., In re Fibreboard Corp.*, 893 F.2d 706, 710-11 (5th Cir. 1990) (recognizing due process limits on allowing fictional litigation to substitute for actually litigating each claim). As the Second Circuit has explained, "[t]he systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff's—and defendant's—cause not be lost in the shadow of a towering mass litigation." *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853 (2d Cir. 1992); *see also In re Repetitive Stress Injury Litig.*, 11 F.3d 368, 373 (2d Cir. 1993) ("considerations of convenience and economy must yield to a paramount concern for a fair and impartial trial" (internal quotation marks omitted)); *Malcolm v. Nat'l*

Gypsum Co., 995 F.2d 346, 350 (2d Cir. 1993) (same).[5]

2. At the same time, by permitting plaintiffs to try their cases against multiple defendants based on evidence common to no one, the proceeding became so large and confusing that it was impossible for any defendant to present a meaningful defense. Evidence inadmissible to one defendant was admitted as to others. *See Cain v. Armstrong World Industries*, 785 F. Supp. 1448, 1457 (S.D. Ala. 1992) ("As the evidence unfolded in this case, it became more and more obvious to this Court that a process had been unleashed that left the jury the impossible task of being able to carefully sort out and distinguish the facts and law of thirteen plaintiffs' cases that varied greatly in so many critical aspects. In the final analysis, the Court is convinced that the defendants did not receive a fair trial."). The complexity, length, and scope of the proceeding precluded the jury from sorting through the evidence and various defenses, and tailoring a verdict to each party's culpability. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982) (due process guarantees "the aggrieved party the opportunity to present his case and have its merits fairly judged"). Gearing the trial to determine the col-

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[5] Similarly, the decision below caused a procedural revision of substantive law by replacing the plaintiff's burden to show that the defendant failed to adequately warn *him or her* with an inquiry into whether the defendant adequately warned an imaginary plaintiff not before the court. *See Talquin Elec. Coop. v. Amchem Prods. Inc.*, 427 So. 2d 1032, 1033 (Fla. Dist. Ct. App. 1983) ("The [generic] adequacy of the label is immaterial . . . [where] a plaintiff is in fact warned by the label."); *see also, e.g. Hon v. Stroh Brewery Co.*, 835 F.2d 510, 513 (3d Cir. 1987) (applying Pennsylvania law) ("If the product's risks were known or should have been known to the user, liability cannot be imposed upon the manufacturer merely because the manufacturer allegedly has failed to warn of that propensity." (internal quotation marks and alteration omitted)); *Strasser v. Transtech Mobile Fleet Serv., Inc.*, 613 N.W.2d 142, 155 (Wis. Ct. App. 2000) ("In the circumstances of this case," where plaintiff knew of relevant danger, "Transtech's failure to warn Strasser about the absence of safety treads in the new ladders was not negligence.").

lective liability of all the defendants over more than fifty years effectively barred any particular petitioner from adequately defending itself.[6]

3. For all of these reasons, the generic liability trial involving the disparate claims of hundreds of thousands of plaintiffs lacked any resemblance to the adversarial testing that stands as the hallmark of fairness in Anglo-American law, belonging instead to the inquisitorial system of continental Europe. "As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994). The Court has mandated that state civil trials operate "according to the settled course of judicial proceedings." *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 30 (1991); *see also Schad v. Arizona*, 501 U.S. 624, 650 (1991) (Scalia, J., concurring in part and concurring in the judgment) ("It is precisely the historical practices that *define* what is 'due.'"). Allowing a single jury to determine that an industry of defendants engaged in "misconduct" for fifty

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[6] A related problem is that the industry-wide trial conducted below, in which a single jury decided abstract questions about the entire industry, blurred substantive standards to the point of unconstitutional vagueness. The generic trial's open-ended nature necessarily caused it to deteriorate from an inquiry into whether a specific defendant breached a tort duty to a specific plaintiff (or even a set of identically situated plaintiffs) into a referendum on an entire industry's conduct over fifty years. In answering generalized yes-or-no questions based on that proceeding, the jury was left little option but to opine on whether the industry was "good" or "bad" overall. It is difficult, if not impossible, to discern how the defendants were to structure their conduct in advance so as to avoid the guilt-by-association findings of wrongdoing that necessarily resulted from the generic proceeding, and the substantive tort standards effectively applied in the proceeding thus lacked the constitutionally-mandated discernable line distinguishing permissible and impermissible conduct. *See, e.g., City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (due process mandates that state provide "the kind of notice that will enable ordinary people to understand what conduct it prohibits").

years—without any requirement to connect that misconduct to a specific plaintiff—is simply contrary to law. Courts, state or federal, are not free to adopt such profound distortions of the processes of civil justice. *See, e.g., Logan*, 455 U.S. at 432 ("because minimum procedural requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate").[7]

B. Generic Findings Of Nondescript Wrongdoing Cannot Be Applied In Subsequent Lawsuits.

As the petitioners explain, generic findings of wrongdoing are by definition nondescript, and due process does not permit such findings to be given preclusive effect in future litigation brought by specific plaintiffs. (*See* Pet. at 12-18.) In addition to the arguments made in the petition, the court's decision to afford preclusive effect to the jury's decision is at odds with due process for three additional but related reasons.[8]

First, the court below held that future juries may use the generic liability findings to apportion fault, as required under Florida's pure comparative negligence regime. (*See* Pet. at

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[7] That is not to suggest that consolidation for generic wrongdoing determinations is never appropriate. A proceeding designed to determine, for instance, whether a single plane crash that killed each plaintiff's decedent was caused by a single defective bolt manufactured by the defendant, or whether a specific batch of allegedly tainted medicine ingested by several plaintiffs contained an adulterant when it left the defendant's factory, would not raise the same due process problems as the proceeding below. The infirmity here arises because the class members' claims stem from different alleged acts of wrongdoing by different people in different places at different times.

[8] As explained above, the fact that the generic proceeding did not result in a constitutionally valid verdict also precludes the application of collateral estoppel. *See supra* at 10-14; *see also supra* at 10 n.4.

App. 27a.) *See also West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 90 (Fla. 1976) (recognizing that Florida's pure comparative fault regime requires apportioning liability under ordinary causation principles). Other than guessing, however, it is impossible for future juries to allocate responsibility in individual cases based on the *generic* findings another jury made when assessing the conduct of an entire industry over the course of fifty years. For example, the prior jury found:

- "that the defendants placed cigarettes on the market that were defective and unreasonably dangerous";
- "that the defendants concealed *or* omitted material information not otherwise known or available knowing that the material was false *or* misleading *or* failed to disclose a material fact concerning the health effects *or* addictive nature of smoking cigarettes *or* both"; and
- "that all the defendants are negligent."

(Pet. App. at 44a (emphasis added).) The Florida Supreme Court did not even attempt to explain how a second jury can possibly allocate fault rationally between a *particular* plaintiff and one of the petitioners based on those generic findings (which fail to answer important questions such as *what* cigarettes were "defective," or *what act* by each defendant was "negligent"). *See Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 500 (1931) (recognizing that "interwoven" issues "cannot be submitted to the jury independently . . . without confusion and uncertainty, which would amount to a denial of a fair trial"); *see also La Plante v. Am. Honda Motor Co.*, 27 F.3d 731, 738 (1st Cir. 1994) ("A new trial may not . . . be limited to fewer than all the issues unless it clearly appears that the issues to be retried are so distinct and separable from the other issues that a trial of those issues alone may be had without injustice."); *Lewis v. Am. Cyanamid Co.*,

715 A.2d 967, 975 (N.J. 1998) ("Because the issues of plaintiff's comparative negligence and defendants' liability intertwine, it would be inappropriate to remand one without the other.").

Second, the Florida Supreme Court's *prospective* ruling that the findings will have preclusive effect represents a departure from traditional practice, and seems to oblige trial courts to accord the generic findings preclusive effect without ever inquiring into whether preclusion is appropriate on the facts of a given case. Ordinarily, the second court—which knows *both* what the earlier finding was *and* how it is to be applied in the later case—determines whether to apply collateral estoppel in a given case. *See* Charles Alan Wright et al., Federal Practice and Procedure § 4413 (2002) (noting "general rule that a court cannot dictate preclusion consequences at the time of deciding a first action," except where it seeks to limit preclusive effect); *cf., e.g.*, Restatement (Second) of Judgments § 27 cmt. c (1982) (discussing context-specific factors courts should use in comparing issue to be precluded to issue previously adjudicated in order to determine whether issues are materially identical). When it decreed that the generic findings will be accorded collateral estoppel effect, by contrast, the court below had (at most) only half of the relevant information. Without any way to predict precisely the concrete factual circumstances in which future plaintiffs will seek to apply the generic findings, the court below was ill-positioned to determine whether preclusion will be appropriate in any specific future case.

Third, although the court below prospectively decertified the class, its decision to retain most of the generic findings and allow former class members to rely on them renders that decertification decision meaningless. If the court had reinstated the certification order, then "generic liability" would have been established by all class members against all petitioners, and individual trials on causation, damages, and

comparative fault would still have been required in order to resolve the outstanding claims by the unnamed class members. There is therefore *no* difference in effect between that outcome and the decision below. Under the court's decision, too, "generic liability" is established by all (former) class members against all petitioners, and individual trials on causation, damages, and comparative fault are required to resolve the outstanding claims by the unnamed (former) class members.

Having decided that continued class treatment was improper, the Florida Supreme Court was not free to ignore the logical consequences of that decision. The court should have recognized instead that, once the class was decertified, the generic "verdict"—and the evidence upon which it was based—could not stand. Instead, the court compounded that error by holding that the verdict would not only stand but could *also* be used by thousands of claimants in future trials.

* * *

In sum, this case provides an excellent vehicle for resolving a recurring issue important to both lower courts and businesses facing mass tort litigation. The Court below dispensed with traditional notions of fair adjudication by sacrificing petitioners' due process rights on the alter of pragmatism. Certiorari is warranted.

CONCLUSION

For the foregoing reasons, and for the reasons stated by petitioners, the Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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No. 06-1545

In the Supreme Court of the United States

R.J. REYNOLDS TOBACCO CO., ET AL.,

Petitioners,

v.

HOWARD A. ENGLE, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

MOTION OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, the Product Liability Advisory Council, Inc. ("PLAC") moves for leave to file the accompanying brief as *amicus curiae* in support of the petition for a writ of certiorari. Counsel for petitioners has consented to the filing of this brief, but counsel for respondents has withheld consent.

PLAC is a non-profit corporation with 127 corporate members representing a broad cross-section of American industry. Its corporate members include manufacturers and sellers of products such as automobiles, aircraft, electronics, chemicals, pesticides, pharmaceuticals, and medical devices. A list of PLAC's current corporate membership is included in an appendix to the accompanying brief.

PLAC's primary purpose is to file *amicus curiae* briefs in cases raising issues that affect the development of product liability law and have potential impact on PLAC's members. PLAC has submitted hundreds of *amicus* briefs in the federal and state appellate courts, including in many of this Court's cases involving issues of federal preemption. See, *e.g.*, *Bates* v. *Dow Agrosciences, Inc.*, 544 U.S. 431 (2005); *Sprietsma* v. *Mercury Marine*, 537 U.S. 51 (2002); *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525 (2001); *Buckman* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001); *Geier* v. *American Honda Co.*, 529 U.S. 861 (2000); *Norfolk S. Ry.* v. *Shanklin*, 529 U.S. 344 (2000); *United States* v. *Locke*, 529 U.S. 89 (2000); *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470 (1996). Because many of PLAC's members manufacture products that are subject to preemptive federal requirements, they have a vital interest in the development of the law of preemption and the proper resolution of this case.

PLAC's motion for leave to file the accompanying brief as *amicus curiae* should be granted.

Respectfully submitted.

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BRIEF FOR THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*[1]

The interest of the *amicus curiae* is described in the accompanying motion for leave to file this brief.

STATEMENT

The preemption issue raised by the petition is significant and recurring, has spawned confusion and conflicts in the lower courts, and clearly merits further review.[2] The Court should take this opportunity to clarify an important aspect of the fractured decision in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), that has caused difficulty in the lower courts: Whether claims that are labeled "fraud" or "negligence" by a plaintiff escape preemption even if they are predicated on liability theories, arguments, and evidence that are preempted under *Cipollone*. Further review would also serve to clarify preemption law outside of the area of tobacco litigation.

1. Under the Federal Cigarette Labeling and Advertising Act ("Cigarette Labeling Act"), 15 U.S.C. §§ 1331-1340, every package of cigarettes imported, distributed, or sold in the United States must bear a conspicuous warning. Between 1970 and 1984, that warning stated: "Caution: Cigarette Smoking Is Dangerous To Your Health." Since 1984, manufacturers have been required to use, on a rotating basis, the following four warnings specified by Congress:

---

[1] Pursuant to S. Ct. Rule 37.6, PLAC states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] PLAC agrees with petitioners that the Florida Supreme Court's issue preclusion ruling also warrants this Court's review. To meet space limitations, this brief focuses solely on the preemption question.

SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.

SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health.

SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, And Low Birth Weight.

SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

Id. § 1333(a)(1). These same rotating warnings have been required since 1984 in all cigarette advertising in the United States, except for outdoor billboards (where slightly modified warnings have been required). *Id.* § 1333(a)(2), (3).

In taking the unusual step of specifying product warnings, Congress sought to "establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health," under which "the public may be adequately informed" about the adverse health effects of cigarette smoking. 15 U.S.C. § 1331(1). Because the federally mandated warnings on every package of cigarettes serve to "adequately inform[]" the public, Congress also decreed that "[n]o statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package." *Id.* § 1334(a).

Congress did not stop there, however. The "comprehensive Federal program" established by the Cigarette Labeling Act had a second purpose: to "protect[]" commerce and the "national economy" from the burden imposed by "diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to *any* relationship between smoking and health." 15 U.S.C. § 1331(2) (emphasis added). To carry out this second purpose, Congress included an express preemption clause, which was amended in 1969 to read (*id.* § 1334(b)):

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this [Act].

2. a. In *Cipollone*, this Court considered, among other things, the effect of this preemption clause on a tort plaintiff's claims under state law for failure to warn, express warranty, fraudulent misrepresentation, and conspiracy to defraud. A portion of Justice Stevens's lead opinion (Section V) that was joined only by Chief Justice Rehnquist and Justices White and O'Connor discussed each of these claims in turn. See 505 U.S. 520-30. Justice Blackmun wrote a separate opinion concurring in part, concurring in the judgment, and dissenting in part, which was joined by Justices Kennedy and Souter. *Id.* at 531-44. Justice Scalia, joined by Justice Thomas, wrote an opinion concurring in the judgment in part and dissenting in part. *Id.* at 544-56. The three opinions combined to produce the following holdings of relevance here: "[T]he 1969 Act pre-empts [the] claims based on failure to warn and neutralization of federally mandated warnings to the extent those claims rely on omissions or inclusions in [manufacturers'] advertising or promotions" but does not preempt plaintiff's "claims based on express warranty, intentional fraud, or conspiracy." *Id.* at 530-31.

Of particular relevance for present purposes is the plurality opinion's analysis of the claims for failure to warn and fraudulent misrepresentation. As for the former, the plurality first looked beyond the "failure to warn" label attached to this claim and identified "two closely related theories" underlying it: "first, that [manufacturers] were negligent in the manner [that] they tested, researched, sold, promoted, and advertised their cigarettes; and second, that [they] failed to provide adequate warnings of the health consequences of cigarette smoking." 505 U.S. at 525. With an eye toward the evidentiary basis for each of these legal theories, the plurality next reasoned that "insofar as [the] claims *require a showing*" that the manufacturers' "post-1969 advertising or promotion should have included additional, or more clearly stated, warnings, those claims are

pre-empted." *Ibid.* (emphasis added). On the other hand, the statute does not preempt "claims that *rely solely on* [manufacturers'] testing or research practices or other actions unrelated to advertising or promotion." *Id.* at 524-25 (emphasis added).

Turning to the claims of fraudulent misrepresentation, the plurality again began by distinguishing two underlying legal theories. Insofar as the plaintiff was "alleg[ing] that [manufacturers], through their advertising, neutralized the effect of federally mandated warning labels," the claim was preempted. 505 U.S. at 527. "Such a claim," the plurality reasoned, "is predicated on a state-law prohibition against statements in advertising and promotional materials that tend to minimize the health hazards associated with smoking." *Ibid.* The plurality took note of the close, long-recognized "relationship between [1] prohibitions on advertising that downplay the dangers of smoking and [2] requirements for warnings in advertising." *Ibid.* And it explained that plaintiff's neutralization "theory of fraudulent misrepresentation is inextricably related to petitioner's first failure-to-warn theory," which "we have already concluded is largely preempted." *Id.* at 528.

On the other hand, the plurality concluded that plaintiff's second fraud theory – intentional fraud and misrepresentation both (1) by false representations of material fact and (2) by concealment of material facts – could escape preemption. 505 U.S. 528. The plurality gave two reasons. *First*, the preemption clause covers "only the imposition of state-law obligations 'with respect to the advertising or promotion' of cigarettes." *Ibid.* (quoting 15 U.S.C. § 1334(b)). Accordingly, plaintiff's "claims that respondents *concealed material facts* are * * * not preempted insofar as those claims rely on a state-law duty to disclose such facts through channels of communication other than advertising or promotion." *Ibid.* (emphasis added).

The plurality's *second* rationale rested on its "understanding of fraud *by intentional misstatement*." 505 U.S. 529 (emphasis added). Plaintiff's claims "that *do* arise with respect to advertising and promotions (most notably claims based on

allegedly *false statements of material fact* made by such advertisements)," the plurality reasoned, "are not preempted" because they "are predicated not on a duty 'based on smoking and health' but rather on a more general obligation, the duty not to deceive." *Id.* at 528-29 (quoting 15 U.S.C. § 1334(b)) (emphasis added). This "understanding of fraud *by intentional misstatement* is appropriate for several reasons," the plurality reasoned. *Id.* at 529 (emphasis added). To begin with, "[i]n the 1969 Act, Congress offered no sign that it wished to insulate cigarette manufacturers from longstanding rules governing fraud." *Ibid.* Beyond that, "[s]tate-law prohibitions on *false statements of material fact* do not create 'diverse, nonuniform, and confusing' standards" because "state-law proscriptions on intentional fraud rely only on a single, uniform standard: falsity." *Ibid.* (quoting 15 U.S.C. § 1331(2)) (emphasis added).

b. Although it garnered only four votes, the plurality's analysis of the preemptive effect of the Cigarette Labeling Act on the plaintiff's post-1969 claims for failure to warn and fraudulent misrepresentation represents the Court's holding because other Justices would have reached the same result on broader grounds. See *Marks* v. *United States*, 430 U.S. 188, 193 (1977). Nevertheless, that analysis was criticized by a majority of the Court. See 505 U.S. at 543 (opinion of Blackmun, J.); *id.* at 556 (opinion of Scalia, J.). Justice Blackmun faulted the plurality for "its frequent shift in the level of generality at which it examines the individual claims." *Id.* at 543. In particular, he cited the plurality's conclusion that "fraudulent-misrepresentation claims (at least those involving false statements of material fact in advertising)" were exempt from preemption because they were predicated on a "general obligation" not to deceive rather than any duty "'based on smoking and health.'" *Ibid.* (quoting 15 U.S.C. § 1334(b)). That analysis, he explained, was inconsistent with the plurality's conclusion that federal law preempted the failure-to-warn claims not based solely on testing, which "could just as easily be described as based on a more general obligation to inform consumers of known risks." *Ibid.* "I can only speculate," Justice Blackmun wrote, "as to the difficulty

lower courts will encounter in attempting to implement today's decision." *Id.* at 543-44.

Justice Scalia agreed that the plurality's "analysis is suspect" because the plurality was "unwilling to apply it consistently." 505 U.S. at 552. "[I]f New Jersey's common-law duty to avoid false statements of material fact – as applied to the cigarette companies' behavior – is not 'based on smoking and health,'" he explained, "the same must be said of New Jersey's common-law duty to warn about a product's dangers." *Ibid.* (quoting 15 U.S.C. § 1334(b) (emphasis added)). In Justice Scalia's view, however, the "failure-to-warn and misrepresentation claims" are "both preempted." *Id.* at 554. Like Justice Blackmun, Justice Scalia predicted that the plurality's analysis would sow confusion in the lower courts. See *id.* at 556.

3. As petitioners demonstrate (Pet. 4, 8, 21-24 & n.9), the generalized jury findings and individual damage awards in this case rest on theories of liability, arguments, and evidence that are preempted under *Cipollone*. Specifically, respondents were permitted to make arguments and adduce evidence purporting to show that petitioners not only failed to provide adequate warnings about the health-related risks of smoking, but also engaged in advertising that "neutralized" the federally mandated warning labels. The Florida trial court overseeing this massive class action refused to give an instruction that would have cautioned the jury not to base liability on preempted theories such as warning neutralization. Pet. 8, 24 n.10. And while it did instruct the jury the liability could not be predicated *solely* on a failure to warn after 1969, the court also erroneously told the jury that federal law did *not* restrict the jury's authority to impose liability for claims "based on negligence, strict liability, express warranty, fraud, misrepresentation, or conspiracy." T.37569-70; see Pet. 8-9. In subsequently denying petitioners' motion for judgment as a matter of law, the trial court held that federal law "certainly does not pre-empt any acts of fraud or conspiracy" occurring after 1969. Pet. App. 138a; see Pet. 9.

Beyond that, the Florida trial court made clear that it viewed the whole doctrine of federal preemption with hostility, vituperatively suggesting that this venerable principle, rooted in the Supremacy Clause of the U.S. Constitution, "doesn't apply to modern science and what's happening today" and "[b]oils my blood and boggles my mind." T.16621-22. Even more remarkably, the trial court suggested at one point that it would find a way to circumvent this Court's decision, offering that "the whole concept of *Cipollone* is terribly wrong" and makes "truth and justice impossible" – and declaring, "I have to figure out how to get around it." T.27878, T.16621-22; Pet. 29.

Rather than rectify this apparent defiance of federal law and this Court's decision in *Cipollone*, the Florida Supreme Court, and the Third District Court of Appeal on remand, gave short shrift to petitioners' preemption arguments by declining to address them despite repeated requests by petitioners for a ruling. Pet. 11 & n.6. The only comment offered by the Florida Supreme Court on this subject was its statement, made in passing in addressing the inflammatory arguments of respondents' trial counsel, that "[a]lthough compliance with the federal warnings preempted any claim based on failure to warn, it did not eliminate the other causes of action that the jury had to consider in Phase I." Pet. App. 38a. Thus, the Florida Supreme Court, like the trial court, treated the label attached to respondents' claims as being dispositive of the preemption issue under *Cipollone*. See also Pet. 24-25; Pet. App. 139a.

SUMMARY OF ARGUMENT

I. Further review is warranted to resolve multiple conflicts created or exacerbated by the decision of the Florida courts in this case. *First*, the Florida courts' treatment of the preemption issue is inconsistent in several ways with *Cipollone*'s delineation of the scope of preemption under the Cigarette Labeling Act, as amended in 1969. *Cipollone* held that claims based on "neutralization" of the federally mandated warnings, or failure to provide those warnings in the first place, are expressly preempted; yet the Florida trial court permitted evidence and

argument based on such impermissible "warning neutralization" and "failure-to-warn" theories of liability. *Cipollone* also held that "fraudulent misrepresentation" claims based on a theory of warning neutralization are preempted; yet the Florida courts apparently were of the view that *all* fraud claims were categorically exempt from preemption, even those based on warning neutralization – and even those based on omissions rather than affirmative misrepresentations.

Second, the Florida courts' decisions also conflict with this Court's *methodology* for analyzing preemption issues in *Cipollone*. The Court there looked beyond the labels attached to claims by plaintiffs to examine the underlying legal theories and evidence that supported those theories; the Florida courts, in contrast, treated pleading labels as utterly dispositive of the preemption issue. In addition to straying from *Cipollone*'s methodology, the Florida courts' approach runs afoul of a line of this Court's decisions holding that preemption cannot be evaded through artful pleading. See, *e.g.*, *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 214 (2004); *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 324 (1981). And by failing to give a jury instruction requested by petitioner that would have ensured that the verdict was not based on preempted arguments and evidence, the Florida courts ignored this Court's recent teachings in *Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431 (2005).

Third, as petitioners persuasively demonstrate (Pet. 24-26), the decision below compounds a serious conflict in the lower courts over whether a plaintiff may defeat preemption under *Cipollone* by recharacterizing failure-to-warn or neutralization claims as claims for fraudulent concealment or suppression. That issue, which arises with substantial regularity in tobacco litigation, is ultimately traceable to certain confusing aspects of this Court's decision in *Cipollone* – aspects that only this Court can clarify.

II. Further review would also clarify the law of preemption outside of tobacco litigation. *Cipollone* is an important

precedent that has influenced the development of preemption law in many cases not involving the Cigarette Labeling Act. Notably, other express preemption clauses in the U.S. Code – of which there are many – contain words or phrases that are similar to the language of the Labeling Act, thus ensuring that *Cipollone*'s influence is broadly felt. Finally, given the variety of safeguards sought by petitioners at trial but squarely rejected by the trial court, this case provides an excellent vehicle for underscoring and further illuminating the critical importance of such safeguards – including (a) evidentiary rulings excluding evidence of preempted liability theories, (b) instructions limiting the jury's use of evidence that bears on both preempted and non-preempted theories, and (c) limitations on arguments made by trial counsel – in ensuring that a trial does not become an occasion for nullification of Congress's preemptive intent.

ARGUMENT

THE PREEMPTION ISSUE RAISED BY PETITIONERS WARRANTS THIS COURT'S REVIEW

I. The Florida Courts' Treatment Of The Preemption Issue Is Inconsistent With *Cipollone* And Other Decisions Of This Court And Deepens A Serious Conflict In The Lower Courts

Although petitioners raised and fully briefed their substantial preemption arguments below, the Florida Supreme Court and Court of Appeal never addressed them. Instead, the Florida Supreme Court offered only the passing observation, made in the context of discussing an issue unrelated to preemption, that "[a]lthough compliance with the federal warnings preempted any claim *based on failure to warn*, it did not eliminate *the other causes of action* that the jury had to consider in Phase I." Pet. App. 38a (emphasis added). In suggesting that the *pleading label* attached to respondents' claims was dispositive of the preemption question, the Florida Supreme Court was merely taking a page from the trial court, which denied petitioners' motion for judgment as a matter of law on the ground that federal law "certainly does not preempt" any "acts of fraud or

conspiracy" occurring after 1969. Pet. App. 138a. The trial court also informed the jury that federal law did not restrict its authority to impose liability for any claims that were "based on negligence, strict liability, express warranty, fraud, misrepresentation, or conspiracy." T.37569-70; see Pet. 8-9; see also Pet. App. 139a (holding that nature of the plaintiffs' "presentation" was significant in evaluating preemption).

The Florida courts' treatment of the preemption issue is inconsistent in multiple respects with *Cipollone*, with other decisions of this Court, and with the decisions of other federal and state appellate courts.

A. For starters, this Court in *Cipollone* did *not* say that the preemption analysis begins and ends with the pleading label selected by a plaintiff. On the contrary, as explained above (at pages 3-4, *supra*), although Justice Stevens's (and Justice Scalia's) opinions did consider each broad subject-matter category of tort claim in turn (see 505 U.S. at 520-30, 548-54), they plainly did not stop there. Instead, the Court looked beyond the pleading labels to identify the precise legal theories that were being advanced. See *In re Tobacco Cases II*, 2007 WL 2199006, at *8 (Cal. Aug. 2, 2007) (*Cipollone* "considered each common law theory * * * *as applied in the particular case*") (emphasis in original). Thus, in analyzing the failure-to-warn claims, the Court first carefully distinguished between "two closely related theories": (1) negligence "in the manner" that petitioners "tested, researched, sold, promoted and advertised their cigarettes"; and (2) failure "to provide adequate warnings of the health consequences of cigarette smoking." 505 U.S. at 524. Similarly, the Court's analysis of the fraudulent misrepresentation claims looked beyond the cause-of-action label and identified two distinct legal theories: (1) neutralization through advertising of the federally mandated warnings; and (2) intentional fraud and misrepresentation. *Id.* at 527. With respect to the latter, the Court went on to further distinguish – and to discuss separately – affirmative misrepresentations and fraudulent omissions or concealment. *Id.* at 528-29. Thus, the

Florida courts' sole reliance on the broad pleading labels chosen by plaintiff is incompatible with *Cipollone*.

Equally mistaken – and at odds with *Cipollone* – was the Florida trial court's conclusion that preemption was categorically unavailable because the plaintiffs had alleged "acts of fraud" (Pet. App. 138a) and were advancing, *inter alia*, claims "based on negligence, * * * fraud, [and] misrepresentation" (T.37569-70). *Cipollone* squarely held that a negligence claim based on the manner of promoting and advertising cigarettes (so that, for example, the cigarettes were unaccompanied by adequate warnings) *is* preempted by the Labeling Act. It also squarely held that a fraudulent misrepresentation claim based on a theory of neutralization is preempted. Thus, merely because a claim can be categorized under the broad pleading label of "negligence," "fraud," or "fraudulent misrepresentation" does not spare it from preemption under Section 1334(b). Under *Cipollone*, courts can – indeed, they must – look beyond the pleading labels chosen by plaintiffs.

Nor is this all. As petitioners point out (Pet. 28), the Florida courts appear to have misread *Cipollone* as sparing from preemption *all* fraudulent misrepresentation claims because fraud claims are not "based on smoking or health" (15 U.S.C. § 1334(b)) but rather on a more general "duty not to deceive." 505 U.S. at 528-29. This is doubly mistaken. First, as just explained, *Cipollone* expressly ruled that fraud claims based on affirmative misrepresentations *are* preempted to the extent they rely on a theory of warning neutralization.

Second, the Florida courts overlooked *Cipollone*'s careful distinction – and differential treatment of – non-neutralization claims of intentional fraud and misrepresentation that are based on (1) false affirmative representations of material fact, versus (2) concealment or omissions of material fact. 505 U.S. at 528-29. It was only the first of these two types of claims that *Cipollone* said was based on a generalized "duty not to deceive." Accord *id.* at 543 (Blackmun, J.) ("the plurality states that fraudulent-misrepresentation claims *(at least those involv-*

ing false statements of material fact) are 'predicated * * * on a * * * duty not to deceive'") (quoting 505 U.S. at 528-29) (emphasis added); *id.* at 552 (Scalia, J.) (discussing plurality's analysis of "New Jersey's common-law duty to avoid *false statements of material fact*") (emphasis added). In contrast, the Court held that *concealment* claims escaped preemption for a different reason: "insofar as those claims rely on a state-law duty to disclose such facts through channels of communication other than advertising or promotion." *Id.* at 528. Had this Court thought that *all* claims that could be labeled "fraud" or "misrepresentation" escaped preemption because they were based on a general duty not to deceive, it would not have ruled that fraud claims based on warning neutralization are preempted. And, of course, there would have been no reason to discuss the concealment allegations separately (much less to carefully distinguish between concealment claims that impose disclosure obligations as to "advertising and promotion" versus alternative channels of communication).

B. The Florida courts' exclusive reliance on superficial pleading labels also ignores *Cipollone*'s willingness to look beyond those labels – and the underlying legal theories advanced by the plaintiff – to the evidence presented at trial. Thus, in discussing the failure-to-warn claims (including those based on negligence in the manner of promotion, advertising and testing and those based on the failure to provide adequate warnings), the Court in *Cipollone* reasoned that "insofar as [the] claims require *a showing* that respondents' post-1969 advertising or promotion should have included additional, or more clearly stated, warnings, those claims are pre-empted." 505 U.S. at 524. (emphasis added). On the other hand, the Court reasoned, the statute does not preempt "claims that *rely solely on* respondents' testing or research practices or other actions unrelated to advertising or promotion." *Id.* at 524-25 (emphasis added). In contrast, the Florida trial courts refused to give an instruction that would have cautioned the jury *not* to base liability on preempted theories such as warning neutralization.

Pet. 8, 24 n.10. That myopic focus on pleading labels is inconsistent with *Cipollone*.

To be sure, preemption is an affirmative defense of law and, as such, it is often resolved on purely legal grounds early in litigation (as on a motion to dismiss). Thus, the initial target of the preemption defense ordinarily is the allegations in the plaintiff's complaint. To prevent the preemption defense from being circumvented with the stroke of a pen, however, this Court has repeatedly stated that a plaintiff may *not* avoid preemption merely through artful pleading. See, *e.g.*, *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 214 (2004) ("[D]istinguishing between pre-empted and non-pre-empted claims based on the particular label affixed to them would 'elevate form over substance and allow parties to evade' the pre-emptive scope of ERISA simply 'by relabeling their contract claims as claims for tortious breach of contract.'") (quoting *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 211 (1985)); *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 324 (1981) ("[C]ompliance with the intent of Congress cannot be avoided by mere artful pleading."); see also *Kirksey* v. *R.J. Reynolds Tobacco Co.*, 168 F.3d 1039, 1042 (7th Cir. 1999) (Posner, J.) (plaintiff may not "skirt th[e] pit" of preemption by artful pleading and, on motion to dismiss, courts should consider "the natural characterization of the claim"); cf. *Credit Suisse Securities (USA) LLC* v. *Billling*, 127 S. Ct. 2383, 2396 (2007) (rejecting approach that would "permit[] plaintiffs to dress what is essentially a securities complaint in antitrust clothing"). The Florida courts' approach to the preemption issue conflicts with these decisions.

Like *Cipollone*, this case arises in a different procedural posture: on appeal from a jury decision following trial (here, the generalized jury findings at the conclusion of Phase I and the individual awards at the conclusion of Phase II-A). In the trial setting, courts must take steps to ensure that arguments and evidence based on legal theories that are preempted are not allowed to become the basis for a judgment. This Court recently emphasized the need for such protective measures in *Bates* v.

Dow Agrosciences LLC, 544 U.S. 431 (2005), which involved a provision of Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136v(b), that preempts certain state requirements that are "in addition to or different from" applicable federal requirements (language the Court interpreted as exempting state requirements that are equivalent to the federal requirements):

> In undertaking a pre-emption analysis at the pleadings stage of a case, a court should bear in mind the concept of equivalence. * * * If a case proceeds to trial, the court's jury instructions must ensure that nominally equivalent labeling requirements are *genuinely* equivalent. If a defendant so requests, a court *should instruct the jury* on the relevant FIFRA misbranding standards, as well as on any regulations that add content to those standards. * * *

544 U.S. at 454 (emphasis altered).

Here, in contrast, the Florida trial court allowed the jury at the close of Phase I to make generalized findings, and at the close of Phase II-A to grant individual awards, that were predicated on theories of liability, arguments, and evidence that are clearly preempted under *Cipollone*. See Pet. 4, 8, 21-24 & n.9. For example, respondents were permitted to argue that liability should be imposed because petitioners' marketing activities "neutralized" or undermined the federally mandated warnings on cigarette packages. Pet. 22-23. Not only did the Florida trial court permit this evidence to be presented, but it refused to give an instruction that would have cautioned the jury *not* to base liability on preempted theories such as warning neutralization. Pet. 8, 24 n.10. The Florida trial court, in short, failed to do precisely what this Court in *Bates* said was required: take measures (including the giving of jury instructions) to ensure that preemption provisions are honored by the jury and not simply operative at the pleadings stage of litigation.

Such safeguards are of vital importance. Without them, there is nothing to prevent a plaintiff whose "warning neutralization" claim is stricken from the complaint on preemption

grounds at the motion-to-dismiss stage from smuggling that claim back into the case by urging the jury to find that defendants committed fraud or negligence by making affirmatively misleading statements aimed at neutralizing the federally mandated warnings. Indeed, unless there are adequate jury instructions preventing this outcome, a plaintiff could urge the jury to rely *exclusively* on such warning neutralization evidence in finding fraud. The potential in this circumstance for the preemption defense – and *Cipollone*'s core holdings – to be easily circumvented is obvious. That is precisely why this Court cautioned in *Bates* that jury instructions are important and "should" be given if requested by a defendant.

C. As petitioners persuasively show (Pet. 24-28), the decision below also exacerbates a conflict in the lower courts over whether a plaintiff may defeat preemption under *Cipollone* by recharacterizing failure-to-warn or neutralization claims as claims of fraudulent suppression or concealment. In marked contrast to the Florida courts in this case, the Fifth and Eleventh Circuits and the Alabama and Texas Supreme Courts have all rejected this tactic. See *Brown* v. *Brown & Williamson Tobacco Corp.*, 479 F.3d 383, 393-94 (5th Cir. 2007) (citing additional cases so holding); *Spain* v. *Brown & Williamson Tobacco Corp.*, 363 F.3d 1183, 1202 (11th Cir. 2004); *American Tobacco Co.* v. *Grinnell*, 951 S.W.2d 420, 439-40 (Tex. 1997); *Canty* v. *Lorillard Tobacco Co.*, 681 So. 2d 1057, 1061 (Ala. 1996) (fraudulent suppression claim generally alleging that manufacturers failed to inform smokers of the risks of smoking is "clearly" preempted under *Cipollone*).

These decisions are correct – and, unlike the decision below, faithful to this Court's analysis in *Cipollone*. As the Texas Supreme Court cogently explained, "fraudulent concealment claims are preempted because they * * * are premised on [the manufacturer's] failure to disclose information regarding the dangers of cigarettes." *Grinnell*, 951 S.W.2d at 439-40; see also *id.* at 440 (stating that claim that manufacturer violated Texas Deceptive Trade Practices Act by making "deceptive representations" is "properly characterized as a neutralization

claim because [the manufacturer] allegedly made deceptive statements in its advertising and promotional materials with the intent of diminishing the impact of the federal warnings"). There is no good reason – none – why a plaintiff should be able to present evidence of warning neutralization and obtain a verdict on the strength of that evidence merely by labeling her claim "fraudulent concealment." Nor is there any material difference – in fact or under *Cipollone* – between a failure-to-warn claim that faults the manufacturer for not including stronger or different warnings in the product advertising and a "fraudulent concealment" claim that rests on an identical evidentiary foundation. For that reason, other federal and state appellate courts of last resort have had no difficulty doing what the Florida courts refused to do here: look past the labels assigned to claims by plaintiffs to examine whether particular claims are preempted under *Cipollone*.

The Court should grant review of the preemption issue to resolve these conflicts in the lower courts, bring the Florida courts into line with this Court's decisions in *Cipollone*, *Davila Kalo Brick*, and *Bates*, and clarify this important area of federal law. As the petition demonstrates (see Pet. 26-27; Pet. App. 207a-214a), this issue arises with substantial regularity in tobacco litigation. It has continued to arise since the petition was filed. See *Clinton* v. *Brown & Williamson Holdings, Inc.*, 2007 WL 2181896, at *8-*12 (S.D.N.Y. July 24, 2007) (claims for fraud in marketing "light" cigarettes are preempted); *Espinosa* v. *Philip Morris, Inc.*, 2007 WL 1773198, at *3-*5 (N.D. Ill. June 18, 2007) (claims for fraud, fraudulent concealment, and negligence, among others, are preempted because gravamen of claims was that defendants failed to communicate certain information and warnings about the risks of smoking); see also *In re Tobacco Cases II*, 2007 WL 2199006, at *9 (Cal. Aug. 2, 2007) (unfair competition claim preempted because it "seeks to impose on * * * tobacco companies a duty not to advertise in a way that could encourage minors to smoke"). Although *Cipollone* was decided 15 years ago, this Court has never sought to clarify the plurality's discussion and analysis of

the fraud claims, which as petitioners demonstrate has been the source of confusion in the lower courts. Further review is needed because, in the end, only this Court can clarify these aspects of *Cipollone*. See *Nichols* v. *United States*, 511 U.S. 738, 746 (1994) (the "degree of confusion following a splintered decision" of this Court "is itself a reason for reexamining that decision") (citing cases).

II. Further Review Of The Preemption Issue Would Have Benefits Outside The Area Of Tobacco Litigation

As petitioners correctly point out, this Court's review of the preemption issue will serve judicial economy because it will avoid the colossal waste of judicial (and party) resources that will occur if the respondents, in a tsunami of individual lawsuits, invoke generalized findings of the Phase I trial that are based on preempted legal theories. If this Court does not grant review of the preemption issue, the Florida courts' errors will be propagated to hundreds if not thousands of individual lawsuits filed in the Florida courts. That prospect alone, which is far from hypothetical (see Pet. 18-19 & n.8), underscores the practical importance of the issue presented as well as its potentially far-reaching effects.

But even apart from the lawsuits that have been and will be filed by individual respondents, and the need for clarification of *Cipollone*'s meaning in other tobacco litigation across the country, further review is warranted because it will have broader salutary effects. *Cipollone* is an important preemption decision. By last count, it has been cited more than 1425 times by the lower state and federal courts. Its influence extends well beyond tobacco litigation and preemption under the Cigarette Labeling Act to other areas of preemption law. "Courts faced with the problem of interpreting and applying the preemption language found in FIFRA," for example, "have * * * looked to *Cipollone* for guidance in determining which causes of action against chemical companies are preempted and which are not." *Canty* v. *Lorillard Tobacco Co.*, 681 So. 2d 1057, 1061 n.7 (Ala. 1996). *Cipollone*'s analysis has also been influential in cases

involving the preemption clause of the Medical Device Amendments (MDA), 21 U.S.C. § 360k(a).[3]

Although *Cipollone*'s influence in cases involving preemption under the MDA and FIFRA has diminished as a result of this Court having issued decisions on those statutes in the intervening years, see *Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431 (2005); *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470 (1996), it must be remembered that there are a wide array of preemption provisions in the U.S. Code, many of which this Court has never addressed.[4] To the extent that these provisions include language similar to the Cigarette Labeling Act, *Cipollone* can be expected to continue to exert a powerful influence on the lower courts even outside of tobacco litigation. See, *e.g.*, *Behrens* v. *United Vaccines, Inc.*, 189 F. Supp. 2d 945, 963-66 (D. Minn. 2002) (citing cases in which courts relied on *Cipollone* in determining scope of preemption under the Viruses, Serums, Toxin, and Analogous Products Act. 21 U.S.C. §§ 151-159, and regulations issued by the Animal and Plant Health Inspection Service); *Palmer* v. *St. Joseph Healthcare P.S.O., Inc.*, 77 P.3d 560, 571-73 (N.M. Ct. App. 2003) (relying on *Cipollone* in determining preemption under Medicare Plus Choice program).

Perhaps for this reason, this Court has not hesitated in the past to grant review to dispel confusion and resolve disagree-

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[3] See, *e.g.*, *Michael* v. *Shiley*, 46 F.3d 1316, 1330-31 (3d Cir. 1995) (relying on *Cipollone* in holding fraud claim not preempted); *Steele* v. *Depuy Orthopaedics, Inc.*, 295 F. Supp. 2d 439, 455-56 (D.N.J. 2003) (relying on *Cipollone* in holding claim for express warranty not preempted and in analyzing fraudulent concealment claim); *Dutton* v. *Acromed Corp.*, 691 N.E.2d 738, 742 (Ohio App. 1997) (relying on *Cipollone* in holding fraud claim not preempted).

[4] See, *e.g.*, Agricultural Marketing Act, 7 U.S.C. § 1626h; Food Security Act, *id.* § 4817; Plant Protection Act, *id.* § 7756; Flammable Fabrics Act, 15 U.S.C. § 1203(a); Child Safety Protection Act, *id.* § 1278 note; Fair Packaging and Labeling Act, *id.* § 1461; Poison Prevention Packaging Act, *id.* § 1476(a); Nutritional Education and Labeling Act, 21 U.S.C. § 343-1.

ments over *Cipollone*'s meaning. For example, in *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995), which involved preemption under the National Traffic and Motor Vehicle Safety Act, 49 U.S.C. § 30103(b), this Court addressed confusion in the lower courts over *Cipollone*'s statement that "[w]hen Congress has considered the issue of pre-emption and has included * * * a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent * * *, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation." 505 U.S. at 517 (internal quotations and citations omitted). Some courts had interpreted that statement as announcing a rule that implied preemption arguments are *never* available under a statute that contains an express preemption provision, but in *Myrick* this Court disagreed. *Myrick*, 514 U.S. at 287-89 (rejecting interpretation as "without merit" and noting that, "[a]t best," the existence of an express preemption clause might "support[] an inference" in certain cases that no implied preemption was intended by Congress).

This case provides the Court with an excellent opportunity to address another aspect of *Cipollone* that has led to confusion in the lower courts: the proper treatment of fraudulent concealment claims. More broadly, further review would also permit the Court to underscore and perhaps extend a central teaching of *Bates* that appears to have been lost on the Florida courts: federal preemption of state law is not just an issue that courts must deal with at the pleading stage, but rather is an expression of Congress's paramount authority – and limits on state authority – that must be enforced at trial through the careful use of evidentiary rulings, cautionary and limiting jury instructions, and limits on the arguments of counsel.[7] In a case such as this,

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[7] The same feature of FIFRA's preemption clause that triggered this Court's admonition in *Bates* – the exemption from preemption of state requirements that are "different from, or in addition to" applicable federal requirements (7 U.S.C. § 136v(b)) – exists in a wide array of other federal preemption provisions. See, e.g., 7 U.S.C. § 4817(b); 21

involving a decision of this Court carefully delineating the scope of preemption under an important federal statute, it is this Court's authority and holdings that must also be enforced through such appropriate safeguards. Unless these safeguards are vigorously deployed by trial judges, Congress's preemptive intent can be easily circumvented. Given the array of safeguards and protective measures sought by petitioners but rejected by the trial court, this case is an excellent vehicle for clarifying the trial court's obligations to prevent the circumvention of the preemption doctrine at trial.

This case provides a compelling illustration of these risks. As explained above, the Florida trial court permitted respondents to make arguments and adduce evidence purporting to show that petitioners not only failed to provide adequate warnings about the health-related risks of smoking, but also engaged in advertising and promotion that "neutralized" the federally mandated warning labels. It also refused to give an instruction that would have cautioned the jury not to base liability on preempted theories such as warning neutralization. Pet. 8, 24 n.10. In short, the trial court allowed respondents to get in through the back door of evidence and argument what this Court's decision in *Cipollone* makes clear cannot be pleaded at the front door of litigation. The fact that the Florida trial court that permitted this clear circumvention of the preemption doctrine and *Cipollone* also voiced outright hostility to the very idea of preemption, disagreement with this Court's decision in *Cipollone* ("the whole concept of *Cipollone* is terribly wrong" (T.27878)), and an intent to "figure out how to get around it" (T.16621-22) – and the Florida appellate courts did nothing to rectify the trial court's apparent defiance of federal law – is all the more reason why further review in this case is imperative.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

U.S.C. §§ 360k(a), 379r(a)(2), 379s, 467e, 678, 1052(b).

Respectfully submitted.

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AUGUST 2007

** Counsel of Record*

APPENDIX

PRODUCT LIABILITY ADVISORY COUNCIL, INC.
LIST OF CORPORATE MEMBERS

3M
A.O. Smith Corporation
Altec Industries
Altria Corporate Services, Inc.
American Suzuki Motor Corporation
Amgen Inc.
Andersen Corporation
Anheuser-Busch Companies
Appleton Papers, Inc.
Arai Helmet, Ltd.
Astec Industries
BASF Corporation
Bayer Corporation
Bell Sports
Beretta U.S.A Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
Black & Decker (U.S.) Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products
BP America Inc.
Bridgestone Americas Holding, Inc.
Briggs & Stratton Corporation
Brown-Forman Corporation
CARQUEST Corporation
Caterpillar Inc.
Chevron Corporation
Continental Tire North America, Inc.
Cooper Tire and Rubber Company
Coors Brewing Company
Crown Equipment Corporation
DaimlerChrysler Corporation
The Dow Chemical Company

E & J Gallo Winery
E.I. DuPont De Nemours and Company
Eaton Corporation
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.
Estee Lauder Companies
Exxon Mobil Corporation
Ford Motor Company
Freightliner LLC
Genentech, Inc.
General Electric Company
General Motors Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Guidant Corporation
Harley-Davidson Motor Company
The Heil Company
Honda North America, Inc.
Hyundai Motor America
ICON Health & Fitness, Inc.
Illinois Tool Works, Inc.
International Truck and Engine Corp.
Isuzu Motors America, Inc.
Jarden Corporation
Johnson & Johnson
Johnson Controls, Inc.
Joy Global Inc., Joy Mining Machinery
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Koch Industries
Kolcraft Enterprises, Inc.
Komatsu America Corp.
Kraft Foods North America, Inc.
Lincoln Electric Company
Magna International Inc.

Mazda (North America), Inc.
Medtronic, Inc.
Merck & Co., Inc.
Michelin North America, Inc.
Microsoft Corporation
Mine Safety Appliances Company
Mitsubishi Motors North America, Inc.
Nintendo of America, Inc.
Niro Inc.
Nissan North America, Inc.
Nokia Inc.
Novartis Consumer Health, Inc.
Novartis Pharmaceuticals Corporation
Occidental Petroleum Corporation
PACCAR Inc.
Panasonic
Pfizer Inc.
Porsche Cars North America, Inc.
PPG Industries, Inc.
Purdue Pharma L.P.
Putsch GmbH & Co. KG
The Raymond Corporation
Raytheon Aircraft Company
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RJ Reynolds Tobacco Company
Sanofi-Aventis
Schindler Elevator Corporation
SCM Group USA Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.
St. Jude Medical, Inc.
Sturm, Ruger & Company, Inc.
Subaru of America, Inc.
Synthes (U.S.A.)
Terex Corporation

Textron, Inc.
TK Holdings Inc.
The Toro Company
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
TRW Automotive
UST (U.S. Tobacco)
Vermeer Manufacturing Company
The Viking Corporation
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Volvo Cars of North America, Inc.
Vulcan Materials Company
Water Bonnet Manufacturing, Inc.
Watts Water Technologies, Inc.
Whirlpool Corporation
Wyeth
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.

MOTION FILED

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No. 06-1545

In the Supreme Court of the United States

R.J. REYNOLDS TOBACCO CO., *et al.*,

Petitioners,

v.

HOWARD A. ENGLE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF PROFESSORS WHO STUDY PREEMPTION LAW AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION OF PROFESSORS WHO STUDY PREEMPTION LAW TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, Professors Aaron Twerski and Anthony Sebok hereby request leave to file the accompanying *amicus curiae* brief in support of the petition for writ of certiorari to the Supreme Court of Florida. Petitioners have given their consent to the filing of this brief. Respondents have refused consent.

As set forth in the accompanying brief, *amici* are professors of law and have a deep interest in their proper interpretation and application of the federal preemption of state tort law. The *amici* are greatly concerned that the Florida Supreme Court's incorrect interpretation of the 1969 Federal Cigarette & Labeling And Advertising Act is the product of an ambiguity in the plurality opinion in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). This ambiguity threatens to produce future unconstitutional results at the trial and appellate levels in both the state and federal courts. Accordingly, the *amici* respectfully request leave to file the accompanying *amicus curiae* brief.

For the foregoing reasons, *amici* respectfully request leave to submit the accompanying brief.

Respectfully submitted.

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BRIEF OF PROFESSORS WHO STUDY PREEMPTION LAW AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*[1]

Aaron Twerski is a Professor of Law at the Brooklyn Law School. Professor Twerski has taught in the fields of products liability, torts and conflicts of law since 1967 at the Duquesne University School of Law, the Hofstra University School of Law and at Brooklyn Law School and has been a visiting professor of law at the Cornell Law School, the Boston University School of Law and the University of Michigan School of Law. He also recently served as Dean at the Hofstra Law School in Hempstead, New York. He has published voluminously in the field of products liability and tort law. He served as co-reporter for the Restatement (Third) of Torts: Products Liability (1998). In addition he is the co-author of two casebooks on torts and products liability and has published numerous articles in the leading law reviews including the Yale Law Journal, the New York University Law Review, the University of Michigan Law Review, the Cornell Law Review and the Texas Law Review.

Anthony Sebok is a Professor of Law at the Benjamin N. Cardozo School of Law. Professor Sebok has taught in the fields of torts, remedies, constitutional law, and jurisprudence since 1992 at Brooklyn Law School and Cardozo School of Law and has been a visiting professor at Princeton University and the Free University of Berlin. He has published in the fields of tort law, remedies, constitutional law, and jurisprudence, with a special focus on punitive damages. He is the co-author of a casebook on torts and has published in the leading law reviews including the University of Michigan

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission.

Law Review, the Texas Law Review, the Iowa Law Review, the Southern California Law Review, and the Vanderbilt Law Review.

In light of their academic interests, both Professor Twerski and Professor Sebok have carefully followed a number of cases, including a great many tobacco cases, that raise novel or significant issues in the law of torts, products liability, and preemption. This obviously is such a case.

ARGUMENT

We submit this *amicus* brief to urge the Court to clarify the ambiguities with regard to pre-emption arising out of the 1969 Federal Cigarette & Labeling And Advertising Act as interpreted by *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). These ambiguities have resulted in confusion leading to a split between the circuit courts of appeal and implicating the decision of the Florida courts in the instant case as well. We take no position whatsoever on the substantive issues as to what claims should or should not be pre-empted. We are, however, greatly troubled that so many courts cannot divine the governing law on pre-emption in multiple cases based on the same factual setting.

In *Cipollone*, the court recognized that a narrow class of misrepresentation cases are not pre-empted by the Labeling Act. Clearly, under *Cipollone*, affirmative misrepresentations are not pre-empted. However, much tobacco litigation today does not involve claims of affirmative misrepresentation. The troubling pre-emption issue in tobacco litigation which this Court needs to clarify concerns state law claims based on fraudulent omission or concealment.

The trial court in Florida held that as long as the plaintiff alleged any species of fraudulent omission on the part of the defendants with regard to their communications to the public about the composition and dangers of their products, the plaintiffs' fraud claims would not be pre-empted by the

Labeling Act. This is clearly inconsistent with what this court said in *Cipollone*. The Court held in *Cipollone* that fraudulent omissions based on a common law duty to inform another of a material fact would be pre-empted. In this case the jury was instructed that "federal law does not limit the liability of any defendant against claims based on negligence, strict liability, express warranty, fraud, misrepresentation,or conspiracy." T.37569-70. However, the *Cipollone* Court recognized a category of unpreempted fraudulent omission claims, but it was an extremely narrow one. As the Fifth Circuit has observed:

> The Court differentiated between claims based on failures to disclose through advertising and marketing, which are pre-empted, and failures to disclose through "other channels," which are not. Again, while the district court recognized that some concealment claims may avoid pre-emption, it erred in finding such a claim here.

Brown v. Brown & Williams Tobacco Corp., 479 F.3d 383, 394 (5th Cir. 2007). The *Cipollone* Court illustrated what it meant by channels other than "advertising or promotion" by referring to a duty to disclose information to an administrative agency.

In the wake of *Cipollone*, the majority of courts have held that common-law claims of fraudulent omission do not come within the narrow exception described above and therefore have found such claims pre-empted. *See, e.g., Johnson v. Brown & Williamson Tobacco Corp.*, 122 F.Supp. 2d 194, 201 (D. Mass. 2000); *Sonmenreich v. Philip Morris, Inc.*, 929 F.Supp. 416, 419 (S.D. Fla. 1996); *Lacey v. Lorillard Tobacco Co.*, 956, 962 (N.D. Ala. 1997); *Griesenbeck v. Am. Tobacco Co.*, 897 F. Supp. 815, 823 (D.N.J. 1995).

Other courts, however, have adopted the position that common-law fraudulent omission cases might not be preempted if there is a state common law obligation to utilize

some hypothetical channel other than "packaging, advertising, and promotion. *See Rivera v. Phillip Morris, Inc.*, 395 F.3d 1142, 1148-49 (9th Cir. 2005).

This case illustrates two troubling aspects of the circuit split over this Court's decision in *Cipollone*.

First, did this Court intend to exclude from pre-emption *all* common-law fraudulent omission cases when it used as an illustration a statutory duty "to disclose material facts about smoking and health to an administrative agency"? *Cipollone*, 505 U.S. at 528. Scholars are legitimately puzzled on this point. In Professor Twerski's *Products Liability* casebook, for example, the authors engage in a "dialogue" triggered by one's report that "students tell me that they don't understand the kinds of fraud actions that are not federally preempted." JAMES HENDERSON & AARON TWERSKI, PRODUCTS LIABILITY: PROBLEMS AND PROCESS 436-37 (5th ed. 2004). Professor Twerski describes the plurality's discussion of claims involving fraudulent concealment as "somewhat baffling," adding that "I honestly don't know what they are saying and what's worse, I don't know why they are saying it." *Id.* at 436; *see also id.* at 437 ("I've said it before and I'll say it again – I just don't get it.").

Second, assuming the Court envisioned excluding from pre-emption some common-law fraudulent omission claims, and not others, what specific "channels of communication" – outside of advertising and promotion – did the Court have in mind? Is there more to this category than the plurality's allusion to a hypothetical law mandating disclosures to a state administrative agency? Since even the Ninth Circuit in *Rivera* assumed that packaging is subsumed within "advertising and promotion" we have difficulty imagining what might be left.

In this respect, we note that the jury instructions implicitly upheld by the Florida Supreme Court raise the same issues that troubled this court in *Philip Morris USA v. Wil-*

liams, 127 S. Ct. 1057 (2007). In *Williams*, the jury instructions allowed the defendant to be punished for conduct that injured a non-party, and it was impossible for the appellate courts to determine whether the verdict was based on unconstitutional grounds. Similarly, in this case the jury instructions preclude any finding that the liability verdicts were predicated only on the narrow fraudulent concealment exception arguably created in *Cipollone*. Although the Florida Supreme Court should have rejected the jury instructions on these grounds, it can be partially excused for its omission because the preemption exception that might have supported the jury verdict has been left undefined for so many years.

If, in fact, there are other channels not covered by preemption, the Court should inform the lower courts so that they can fashion constitutionally valid jury instructions adequate to test whether the plaintiffs have met their burden of proof on duty and causation. The stakes in ongoing tobacco litigation are too substantial to leave the matter in uncertainty any longer than necessary.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2007

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No. 06-1545

IN THE

Supreme Court of the United States

R.J. REYNOLDS TOBACCO CO., *et al.*,
Petitioners,

v.

HOWARD A. ENGLE, *et al.*
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION OF WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) respectfully moves for leave to file the attached brief as *amicus curiae* in support of Petitioners. Counsel for Petitioners has consented to the filing of this brief. Counsel for Respondents declined to provide consent (except that counsel would have consented had WLF agreed to file its brief weeks in advance of the filing deadline – a condition that WLF was unable to meet), thereby necessitating the filing of this motion.

WLF is a non-profit public interest law and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free-enterprise, individual rights, and a limited and accountable government.

In particular, WLF regularly participates in tort reform efforts. WLF is concerned that economic development and consumer welfare not be impeded by excessive and improperly certified class action litigation. To that end, WLF regularly participates in court proceedings touching upon the proper scope of class action litigation. *See, e.g., Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214 (9th Cir. 2007); *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill.2d 100 (2005); *Linder v. Thrifty Oil Co.*, 23 Cal. App. 4th 429 (2000). WLF also participated in this case as an *amicus curiae* when it was before the Florida Supreme Court.

WLF also has frequently appeared as *amicus curiae* in this and other federal courts in cases involving federal preemption issues, to point out the economic inefficiencies often created when multiple layers of government seek simultaneously to regulate the same business activity. *See, e.g., Bates v. Dow AgroSciences LLC*, 544 U.S. 431 (2005); *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001);

Geier v. American Honda Motor Co., 529 U.S. 861 (2000). WLF supports preservation of the policy of national uniformity embodied in the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331, *et seq.* (the "Labeling Act"). That policy strongly reinforces First Amendment values – it limits the authority of States to restrict constitutionally protected advertising by imposing tort liability on advertisers.

WLF fully supports Petitioners' efforts to obtain review of the two Questions Presented in their petition. WLF is especially interested in participating in these proceedings, however, because of its dismay over the manner in which this entire lawsuit has been handled by the Florida courts. WLF believes that something has gone seriously wrong here. The trial court adopted a trial plan that ran roughshod over defendants' constitutional rights. It tolerated egregious misconduct by counsel for the plaintiffs, misconduct apparently designed to persuade the jury to ignore the law in arriving at a verdict. It certified a massive plaintiff class, with little apparent regard for how the claims of individual class members could be adjudicated. After Phase II of the proceedings, it entered a $145 *billion* judgment against the defendants, even though the claims of 99.999% of the class members had not yet been decided. The Florida Supreme Court upheld most of the Phase I jury findings in favor of the plaintiff class and ordered that they be given preclusive effect in subsequent individual trials, even though those generalized findings cannot be tied in a meaningful manner to any single class member. The trial judge stated that he had disdain for the entire concept of federal preemption law, while the Florida appellate courts simply refused to rule on Petitioners' consistently-asserted argument that the Labeling Act preempted all of the plaintiffs' claims. As a result of the highly irregular proceedings conducted to date, Petitioners now find themselves facing thousands of trials with the rules stacked against them, and the prospect of massive liability judgments.

WLF has no direct interest, financial or otherwise, in the outcome of this case. It is filing due solely to its interest in ensuring further judicial review of the important issues raised by this case. Because of its lack of direct economic interests, WLF believes that it can assist the Court by providing a perspective that is distinct from that of any party.

For the foregoing reasons, the Washington Legal Foundation respectfully requests that it be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether the Due Process Clause prohibits a state court from giving preclusive effect to a jury verdict when it is impossible to discern which of numerous alternative grounds formed the basis for the jury's finding of wrongful conduct.

2. Whether, merely by invoking characterizations such as "fraud" or "negligence," a plaintiff may evade federal preemption under this Court's ruling in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), which holds that the Federal Cigarette Labeling and Advertising Act preempts state-law liability based, *inter alia*, on allegations that cigarette manufacturers failed to warn about the dangers of smoking or marketed cigarettes in ways that "neutralized" the federally mandated warnings.

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICUS CURIAE*

The interests of *amicus curiae* Washington Legal Foundation (WLF) are set forth fully in the motion accompanying this brief.[1] In brief, WLF is a non-profit public interest law and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free-enterprise, individual rights, and a limited and accountable government.

WLF fully supports Petitioners' efforts to obtain review of the two Questions Presented in their petition. WLF is filing separately to express its dismay over the manner in which this entire lawsuit has been handled by the Florida courts. WLF believes that review is particularly warranted because of the highly irregular nature of the proceedings below and in light of the enormous financial stakes at issue.

STATEMENT OF THE CASE

Petitioners (the major U.S. cigarette manufacturers as well as two industry organizations) seek review of a Florida Supreme Court decision that upheld large damage awards to two plaintiffs and left in place substantial portions of the jury findings in a class action brought on behalf of hundreds of thousands of Florida smokers. Respondents (collectively, the "plaintiffs" or the "plaintiff class") claim to have suffered, or are suffering, from illnesses caused by their addiction to

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

cigarettes. They charge that Petitioners' wrongful conduct caused their illnesses.

The trial court initially certified the case as a nationwide class action; it defined the class as all U.S. citizens and residents, and their survivors, who suffer or have suffered from illnesses caused by their addiction to cigarettes. On interlocutory appeal, the Florida Court of Appeal in 1996 reduced the size of the class to include Florida smokers only.

The trial court thereafter adopted a three-phase trial plan. Phase I consisted of a year-long trial of so-called "common" issues related exclusively to Petitioners' conduct. During that phase, the trial court barred any evidence relating to any identifiable class member's knowledge, conduct, medical condition, or other circumstances. Instead, the plaintiffs' evidence focused on a broad range of conduct alleged to have been engaged in by Petitioners over more than half a century. At the end of Phase 1, the jury found that smoking causes certain diseases and that cigarettes are addictive or dependence producing. The Phase 1 jury also made general findings regarding some aspects of Petitioners' conduct – including that Petitioners were "negligent," sold cigarettes that were "defective," and intentionally misled smokers regarding the health effects of smoking. Pet. 7.

In Phase II-A, which lasted five months, the jury heard evidence relating specifically to three plaintiffs chosen by class counsel. It determined that unspecified conduct found wrongful in Phase I was the legal cause of injury suffered by those individuals. They were awarded compensatory damages of $12.7 million. The jury made no finding regarding punitive damages.

In Phase II-B, the jury determined the amount of punitive damages for the entire class to be $145 billion, without

allocation of that amount to any class member. Indeed, because the claims of only three individual class members had been tried up to that point, Petitioners' liability to any other class members had not yet been established – and still has not been established. Nonetheless, in November 2000, the trial court issued a judgment directing Petitioners not only to pay the compensatory award but also to immediately deposit the $145 billion in punitive damages into the court registry for the benefit of the entire class. Pet. App. 8a. The court further ordered that interest on the punitive damages award would begin accruing immediately. *Id.* Petitioners appealed that judgment before the start of Phase III, which was to consist of a series of individual trials at which Petitioners' liability to all remaining class members (numbering in the hundreds of thousands) was to be determined.

The Florida Third District Court of Appeal reversed the final judgment and remanded with instructions that the class be decertified. *Id.* 68a-126a. The appeals court concluded, "The present case presents a classic example of the inherent dangers that arise when a complex mass tort action is improperly certified." *Id.* 126a. The court said that Phase II-A proceedings (*i.e.*, the trials of the individual claims of the three class representatives) "conclusively established" that class certification had been improper because "individualized issues predominate and render further proceedings unmanageable," *id.* 79a, and because class representation was not "superior" to individual suits. *Id.* 81a-83a. The court also held that awarding and ordering payment of class-wide punitive damages improperly put "the cart before the horse." The court explained that the trial court had erred by:

> a) improperly requiring the defendants to pay punitive damages for theoretical injuries to hundreds of thousands of class members, without a determination that defendants are liable for such injuries; b) precluding the

> constitutionally required comparison of punitive damages and compensatory damages; and c) eliminating the jury's discretion to assess punitive damages based upon the individual class members' varying circumstances.

Id. 88a.

The appeals court also held that plaintiffs' counsel's "improper race-based appeals for nullification caused irreparable prejudice and require reversal." *Id.* 103a. The court described counsel's argument as "inflammatory" and "egregious" and stated that the trial judge "abdicat[ed]" his "most basic duty" in the face of counsel's misconduct. *Id.* 112a, 117a, 116a n.44. The court deemed it "obvious" that "the 'runaway' jury award was largely the result of numerous improper comments by counsel directing the jury to disregard limitations on punitive damages." *Id.* 103a. The appeals court noted that Petitioners objected "repeatedly" to these improper comments; and that even though the trial judge sustained some of the objections, those actions were insufficient to eliminate the prejudice because it was not possible to "unring the bell." *Id.* Having reversed the trial court's judgment on other grounds, the appeals court did not address Petitioners' argument that all of the plaintiffs' claims were preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331, *et seq.* (the "Labeling Act").

By a 4-2 vote, the Florida Supreme Court reversed much of the appeals court's decision. Pet. App. 1a-67a. The Supreme Court held, contrary to the appeals court and without explanation, that the trial court "did not abuse its discretion in certifying the class." *Id.* 27a. The Supreme Court's apparent motivation was a desire to avoid wasting the significant judicial resources that went into the Phase I and Phase II-A trials. Although acknowledging (as had the appeals court) that the overwhelming weight of case law from other jurisdictions

rejects class certification in tort actions brought by smokers against the cigarette industry, *id.* 26a & n.9, the Supreme Court said that those cases were distinguishable because here a "trial on all common issues" had already occurred at the time that the class certification issue was being reviewed. *Id.* The Supreme Court opined, "Invalidating the completed class action proceedings on manageability and superiority grounds after a trial has occurred does not accord with common sense or logic." *Id.* 26a-27a.

The Supreme Court went on to conclude unanimously that continued class treatment for Phase III of the trial plan was "not feasible because individualized issues such as legal causation, comparative fault, and damages predominate." *Id.* 27a. The court nonetheless held, by a 4-2 vote, that the requirement that the class be decertified did not require invalidation of the Phase I jury findings. Rather, the court held, the "pragmatic solution" was to retain all the Phase I findings except those that involved "highly individualized determinations" (identified by the court as those relating to the plaintiffs' claims for fraud and intentional infliction of emotional distress) and one the court deemed "premature" (that Petitioners' conduct rose to a level that would permit an award of punitive damages). *Id.* 30a-31a.

The Supreme Court also overturned the appeals court's ruling that the remarks of plaintiffs' counsel to the jury required reversal. *Id.* 33a-39a. While acknowledging that "trial counsel ventured very close to the line of reversible error on a number of occasions" during the Phase I trial, *id.* 33a, and that there was "absolutely no justification" for a series of racially charged remarks made during closing argument for the purpose of "incit[ing] racial passions," *id.* 38a, the Supreme Court concluded that "under the totality of the circumstances" reversal was not warranted. *Id.* 39a. The Supreme Court also reinstated the compensatory damage awards in favor of two of

the three class representatives whose claims were tried in Phase II-A (Angie Della Vecchia and Mary Farnan). *Id.* 39a-43a. The appeals court had held that judgment should have been entered against them because their claims did not accrue until after the cut-off date for class membership. *Id.* 95a n.23. The Supreme Court disagreed, finding that their claims had accrued by November 21, 1996, which the court deemed the appropriate cut-off date. *Id.* 40a-42a.

The Supreme Court agreed with the appeals court that the $145 billion punitive damages award could not stand. The Supreme Court held that the trial court "erred in allowing the jury to determine a lump sum amount before it determined the amount of total compensatory damages for the class." *Id.* 16a. It also held that the award was excessive as a matter of federal constitutional and Florida law. *Id.* 19a-23a. The court did not rule on Petitioners' argument that the Labeling Act preempted all of the plaintiffs' claims, an argument which the appeals court had not considered because it reversed on other grounds but which Petitioners had brought to the Supreme Court's attention. The court held that in any subsequent trial of claims brought by any individual class plaintiff against Petitioners, the Phase I jury findings (except as noted above) would be "given res judicata effect," provided that the plaintiff filed suit within one year. *Id.* 45a.

Justice Wells, joined by Justice Bell, dissented in part. *Id.* 53a-65a. While agreeing with the decision to overturn the punitive damages award, he argued that the case was *never* a proper class action and that it was improper to give res judicata effect to the Phase I jury findings. *Id.* 57a-58a. He also argued that the remarks of plaintiffs' counsel were "offensive" and "extreme" and required reversal. *Id.* 64a-65a.

In their motion for rehearing before the Florida Supreme Court, Petitioners reiterated the arguments that form the basis

of this petition: giving effect to the Phase I jury findings would violate their due process rights, and their Labeling Act preemption claims still needed to be addressed. The court denied the motion without directly addressing either argument. *Id.* 187a-189a. Similarly, the appeals court on remand denied without comment Petitioners' request that it address the preemption issue and all other issues not yet ruled on by the Florida appellate courts. Thus, Petitioners are faced with substantial final judgments in favor of Farnan and Della Vecchia, as well as the prospect of thousands upon thousands of trials at which Petitioners will be bound by numerous Phase I jury findings - even though they have never received any explanation from the state appeals courts as to why their significant arguments based on governing federal law were rejected.

REASONS FOR GRANTING THE PETITION

This petition raises issues of exceptional importance. State and federal courts across the country have turned with increasing frequency to class action devices in the name of efficiency: class actions are often viewed as a appropriate means of reducing the judicial resources necessary to resolve tort actions alleged to affect massive numbers of consumers. As the petition ably demonstrates, all too often the due process rights of defendants and absent class members are sacrificed in such proceedings in the name of efficiency. Factual and legal issues alleged to be common to the class are decided on a class-wide basis and are deemed binding on all parties, often without any showing that the findings have any bearing on the claims of individual class members. Thus, as here, a jury may be asked to determine - based on a massive quantity of evidence spanning many years - whether a defendant acted negligently toward the class as a whole, and then a generalized jury finding of negligence ends up being used to preclude the defendant from demonstrating that its actions in relation to a specific class member were not negligent. Review is

warranted to allow this Court an opportunity to provide lower courts with an urgently needed reminder that while class actions can be helpful tools in improving judicial efficiency, they should never be employed at the cost of litigants' due process rights.

WLF fully supports Petitioners' contention that review is warranted on both their due process and preemption claims. WLF writes separately because of its dismay over the manner in which the Florida courts have handled this entire lawsuit – a lawsuit raising multi-billion dollar damage claims that could bankrupt an entire industry. Something has gone seriously wrong here, and the Court should not sit by and allow this injustice to continue.

Given its focus on the two Questions Presented, the petition by necessity only briefly touches on the highly irregular nature of the proceedings below. The trial court adopted a trial plan that ran roughshod over defendants' constitutional rights. It tolerated egregious misconduct by counsel for the plaintiffs, misconduct apparently designed to persuade the jury to ignore the law in arriving at a verdict. It certified a massive plaintiff class, with little apparent regard for how the claims of individual class members could be adjudicated. It gave jury instructions that seriously prejudiced Petitioners and approved a verdict form that allowed the jury to make misconduct findings untethered to any identifiable pieces of evidence – findings that were then supposed to be used in future proceedings even though there was no way to tell what specific facts the first jury had found. After Phase II of the proceedings, it entered a $145 *billion* judgment against the defendants, even though the claims of 99.999% of the class members had not yet been decided. In a blatant effort to force Petitioners to capitulate and abandon appeals, it ordered the entire $145 billion deposited immediately into the court

registry. The trial judge openly expressed his disdain for the entire concept of federal preemption law.

The Florida Supreme Court's shortcomings in handling this case are almost as extensive. It upheld most of the Phase I jury findings in favor of the plaintiff class and ordered that they be given preclusive effect in subsequent individual trials, even though those generalized findings cannot be tied in a meaningful manner to any single class member. The court simply refused to rule on Petitioners' consistently-asserted argument that the Labeling Act preempted all of the plaintiffs' claims. It repeatedly valued supposed judicial efficiency over the rights of litigants. For example, it upheld the class certification order on the ground that failing to do so would result in wasting the judicial resources devoted to the Phase I and Phase II-A trials, all the while recognizing that case law overwhelming opposes class certification in cases of this sort because of its unfairness to the litigants.

As a result of the highly irregular proceedings conducted to date, Petitioners find themselves facing thousands of trials with the rules stacked against them, and the prospect of massive liability judgments. Particularly in light of the huge financial stakes at issue, review is warranted to correct this miscarriage of justice.

Review is also warranted because the Florida proceedings are not unique. Rather, they exemplify the tendency of many state and federal courts to adopt inappropriate shortcuts when faced with large numbers of claims. This Court does not, of course, sit in review of state rules governing when multiple claims should be consolidated as class actions. Nonetheless, experience has shown that, where plaintiff classes are certified despite the predominance of individual issues over issues common to the class, courts inevitably must sacrifice the due process rights of litigants to allow the cases to move forward.

Review is warranted to provide guidance to state and federal courts regarding constitutional limits on such procedures.

I. REVIEW IS WARRANTED BECAUSE THE FLORIDA JUDICIAL SYSTEM WENT SERIOUSLY AWRY IN THESE PROCEEDINGS

Commentators have long recognized that courts are constantly tempted to bend substantive law to make class actions more manageable. *See. e.g.*, Jack B. Weinstein, *Some Thoughts on the "Abusiveness" of Class Actions,* 58 F.R.D. 299, 301-02 (1973). Courts throughout the nation, including this Court, have emphatically condemned such attempts to tailor the substantive law to accommodate the procedural concerns implicated by class actions. *See, e.g., Phillips Petroleum, Inc. v. Shutts*, 472 U.S. 797, 820-21 (1985) (holding that a court "may not take a transaction with little or no relationship to the forum and apply the law of the forum in order to satisfy the procedural requirement that there be a 'common question of law'"; Court rejected such reasoning as "something of a 'bootstrap' argument"); *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1020 (7th Cir. 2002) ("Tempting as it is to alter doctrine in order to facilitate class treatment, judges must resist so that all parties' legal rights may be respected"), *cert. denied*, 537 U.S. 1105 (2003).

Unfortunately, as the record makes all too clear, the Florida courts succumbed to those temptations in this case. Despite the implausibility of assertions that there are more than a handful of issues of fact common to all class plaintiffs, the trial court devised a trial plan that entailed a year-long trial devoted to examining the conduct of Petitioners over more than half a century. It certainly saved judicial resources to allow the jury to make generalized findings, based on that half-century of evidence, regarding whether Petitioners acted

negligently or sold defective products – and to make those findings binding on Petitioners with respect to all class plaintiffs. It also saved resources, after a year-long trial, not to declare a mistrial despite closing arguments by plaintiffs' counsel that the Florida court deemed "improper," "race-based," and having "absolutely no justification." It also saved resources for the Florida Supreme Court not to throw out the Phase I jury findings despite overturning the trial court's trial plan on the ground that Phase III was "not feasible because individualized issues such as legal causation, comparative fault, and damages predominate." Pet. App. 27a. But for all the reasons set forth in the petition, all those resource-saving decisions were made at the expense of Petitioners' due process rights. Review is warranted to send a strong message to federal and state courts that while use of resource-saving class action devices is often appropriate, courts must at the same time fully respect all parties' legal rights.

Review is particularly warranted because of the highly irregular nature of the proceedings in this case. WLF is writing separately in order to highlight some of the more egregious irregularities.

A. The Backwards Trial Plan

The trial plan adopted by the trial court – over the objections of Petitioners – made no logical sense. It called for the jury to determine whether to award punitive damages to the entire 700,000-person plaintiff class (Phase II-B) before determining whether Petitioners were liable for injuries suffered by any class plaintiffs and whether those class members were entitled to compensatory damages (Phase III).[2]

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[2] The only exception is that the jury did determine Petitioners' liability to three hand-picked class representatives during Phase II-A.

As the Court of Appeal noted, proceeding in that order "place[d] the proverbial 'cart before the horse.'" Pet. App. 99a. The Florida Supreme Court agreed that awarding punitive damages before determining the plaintiff class's right to compensatory damages "violates due process because there is no way to evaluate the reasonableness of the punitive damages award without the amount of compensatory damages having been fixed." *Id.* 16a. Moreover, by placing entitlement to punitive damages in Phase I, the plan allowed massive amounts of highly prejudicial evidence relevant only to punitive damages to be introduced at a time when the jury had not determined that the defendants were liable to a single individual plaintiff.

The only perspective from which this backward trial plan made sense was the perspective of one seeking to force Petitioners to capitulate and enter into a massive settlement as the only alternative to staving off bankruptcy. Indeed, the post-Phase II-B orders issued by the trial court indicate precisely such an intent. Petitioners were ordered to deposit the entire $145 billion punitive damages judgment into the Court registry, and the court further ordered that interest on the award would begin accruing immediately. Needless to say, Petitioners lacked the financial resources to comply with that order. The result was that Petitioners' ability even to appeal the trial court's judgment was thrown into serious question.[3]

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[3] As numerous commentators have recognized, defendants that face a large certified class and hence enormous potential damages are "under intense pressure to settle." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir.) (Posner, C.J.), *cert. denied*, 516 U.S. 1984 (1995). Such settlements – whether entered into before trial or during the appeals process – can in many instances legitimately be deemed "blackmail settlements." Henry Friendly, *Federal Jurisdiction: A General View*, at 120 (1973). WLF deems it particularly inappropriate for trial courts to structure class action trial plans in a manner designed

(continued...)

B. Attorney Misconduct

Every court that has addressed the issue has agreed that remarks made by plaintiffs' counsel to the jury throughout the Phase I trial were grossly inappropriate. The appeals court held that counsel's "improper race-based appeals for nullification caused irreparable prejudice and require[d] reversal." Pet. App. 103a. The Florida Supreme Court agreed that there was "absolutely no justification" for a series of racially charged remarks made during closing argument for the purpose of "incit[ing] racial passion," *id.* 38a, and that plaintiffs' counsel "ventured very close to the line of reversible error on a number of occasions." *Id.* 33a. The court ultimately decided that the improper remarks were insufficient to mandate reversal – a reversal that would have entailed throwing out more than a year's worth of judicial proceedings. WLF wishes to highlight the extent of the attorney misconduct. The need for review by this Court is heightened by the fact that these proceedings were tainted by misconduct – particularly because, the record shows, the misconduct was premeditated.

Plaintiffs' counsel "began making racially charged arguments on the first day of trial" – before a jury whose six members included four African-Americans. *Id.* 104a. In his opening statement, he told jurors that Petitioners "study races" and "divide the American consumer up into groups," including "white" and "black." *Id.* Counsel later: (1) presented a witness who testified that Petitioners' advertising had "perpetuated" the racial segregation of America through the 1980s; and (2) suggested that arguing that there were "two sides" to the lawsuit was like arguing that there were "two sides" to genocide, slavery, and the Holocaust. *Id.* 104-106a.

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[1](...continued)
to ratchet up settlement pressures to an even higher level.

In response to Petitioners' arguments that federal law explicitly protected the right to sell cigarettes, counsel repeatedly urged the jury to nullify the law. Over Petitioners' objection, counsel was permitted to argue, "[The defendants say] [i]t's a legal product. Legal don't make it right." *Id.* 106a. He repeatedly urged the jury to fight what he called "unjust laws," citing the civil disobedience of Martin Luther King and Rosa Parks. *Id.* 107a. He urged the jury not to "get all teary-eyed about the law" because, "Historically, the law has been used as an instrument of oppression and exploitation." *Id.* 105a. He noted that the courthouse in which the case was being tried had once had "drinking fountains which said Whites Only." *Id.* 107a n.36. Petitioners objected to all these comments, and the judge sustained some of the objections; but he rejected Petitioners' mistrial motions, reasoning that it would be "foolish" to "lose the opportunity to get the case resolved" after devoting 11 months to a trial. *Id.* 109a.

Moreover, the evidence demonstrated that counsel's improper and prejudicial remarks were premeditated. The appeals court recounted at length passages from a book published by counsel in 1992, in which he boasted of prevailing in a case after making arguments virtually identical to those described above. *Id.* 110a n.37. He explained in the book that by discussing Martin Luther King and the unjust laws King fought against, he could persuade jurors to nullify laws – and that no amount of warnings from a trial judge can eliminate the prejudice created by his arguments. *Id.*[4] Regard-

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[4] *See* Stanley Rosenblatt, *Murder of Mercy: Euthanasia on Trial* (1992). As recounted by the Florida Court of Appeal, Mr. Rosenblatt's book sets forth his time-tested strategy for successfully urging juries to ignore the law:

> Plaintiffs' counsel, Mr. Rosenblatt, declares in his book that:
> (continued...)

less whether this type of intentional misconduct is sufficient by itself to mandate a mistrial, its presence heightens the sense of injustice that pervades these proceedings and strengthens the case for granting review.

C. The Runaway Jury

The appeals court concluded that the jury's huge damage awards were grossly excessive and deemed it "obvious" that "the 'runaway' jury award was largely the result of numerous improper comments by counsel directing the jury to disregard

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[4](...continued)
"When the law conflicts with common sense, common decency and simply fairness and justice, it is the law that must yield." Although he concedes that attorneys cannot explicitly tell a jury to "ignore the law," Mr. Rosenblatt boasts of his ability to persuade juries "in a subtle way" to nullify the law: "The area I would need to spend the most time on [during trial] was my 'Piss on the Law' theme. Whenever I came close to being direct on that subject the State would object, and their objections would always be sustained. I had to figure a way to tell the jury in a subtle way that they should disregard the law."

The book describes Mr. Rosenblatt's tactics for obtaining jury nullification through racial pandering and references to unjust laws: "I assured [my clients] that I would get out my words about Martin Luther King and the unjust laws he fought against. That guaranteed that the prosecutors would be on their feet in a flash, but the black juror, the black male alternate, and the white jurors would know exactly where I was coming from." A review of the comments made during the Phase I closing and those referred to in the book, reveals Mr. Rosenblatt followed the script he had laid out in his book almost to the letter. Plaintiffs' counsel, Mr. Rosenblatt, was well aware that the nullification arguments and racial appeals he presented to the jury in this case would result in incurable prejudice.

Id.

limitations on punitive damages." *Id.* 103a. As "proof" that the jury was infected by prejudice, the appeals court cited the $790 million punitive damage award entered against the Liggett defendants, an amount 23 times greater than their net worth. *Id.* 118a-120a. The appeals court noted that there was "no evidence" that the Liggett defendants had any early knowledge of the health effects of smoking, "no evidence to support any punitive award" against them, and no claim that any of the class representatives purchased Liggett cigarettes. *Id.* The court concluded, "The only explanation for this clearly improper verdict against a company whose cigarettes none of these plaintiffs ever used, is that the integrity of the entire trial was compromised as a result of the trial errors and improper conduct of counsel." *Id.* 120a. WLF respectfully suggests that review is particularly warranted in light of the appeals court's finding that the "integrity" of the entire trial was compromised.

D. Improper Jury Instructions

The "trial errors" of which the appeals court spoke included jury instructions phrased in a manner that was deeply prejudicial to Petitioners. One particularly egregious example was a jury instruction regarding "causation." A central claim in the plaintiffs' case was that Petitioners fraudulently asserted, beginning in the 1950s, that a causal link between smoking and health had not been "scientifically" proven. Petitioners responded that their statements regarding "scientific" causation were accurate because, in the 1950s, no one had demonstrated a *biological mechanism* by which exposure to cigarette smoke leads to disease. Counsel for Petitioners premised their closing argument on assurances from the trial judge that he would instruct the jury that the statements at issue were not actionable so long as causation had not been demonstrated in this strict scientific sense. T. 36317-20. Nonetheless, contrary to those assurances and contrary to Florida law, the trial judge (at the request of plaintiffs' counsel) changed the "causation"

instruction after Petitioners had presented most of their closing argument to the jury. The new instruction stated that in determining whether the tobacco industry had lied, the jury should determine whether in the 1950s smoking could be said to be the "legal" cause of disease – a far more lenient standard. T. 37562. The court's about-face not only distorted what had been said by tobacco industry officials but also was highly prejudicial. Petitioners were blind-sided by the last-minute change and lost credibility with the jury when the judge's instructions contradicted counsel's explanation to the jury regarding what was meant by causation.

E. Failure to Resolve Federal Claims

The petition raises two issues: whether the Due Process Clause prohibits Florida from giving preclusive effect to the Phase I jury findings when it is impossible to discern which of numerous alternative grounds formed the basis for the jury's findings of wrongful conduct; and whether the Labeling Act preempts the plaintiffs' claims. Despite Petitioners' repeated efforts to persuade the Florida appellate courts to address those issues, they have never done so – other than to deny Petitioners' requests without explanation. The failure of state courts to address federal issues that have been properly raised is a serious abdication of their constitutional responsibilities. *See, e.g., Howlett v. Rose*, 496 U.S. 356 (1990).

WLF respectfully suggests that the failure of the Florida courts to address these important federal issues serves to increase the cert-worthiness of this case. State courts should not be rewarded for refusing to address federal issues by being given an exemption from U.S. Supreme Court review. Other state courts have demonstrated their commitment to respecting the broad preemptive sweep of the Labeling Act. *See, e.g., In re Tobacco Cases II*, ___ Cal. 4th ___, 2007 Cal. LEXIS 8189 (Cal. Aug. 2, 2007). Florida courts should be expected to do

the same. At the very least, the Court should grant the petition, vacate the judgment, and remand the case with directions that the Florida appellate courts address whether the plaintiffs' claims are preempted by the Labeling Act.

To be fair, the trial judge did not ignore the Labeling Act. Rather, he simply expressed a clear disdain for federal preemption of state law tort actions and made clear that he would find a way to avoid application of preemption doctrine. The trial court said that "preemption doesn't apply to modern science and what's happening today"; it "boils my blood and boggles my mind" that Congress would restrict State's power to regulate cigarette labeling and advertising; "I have to figure how to get around it, thank you very much, preemption"; and "I have so much trouble – . . . intellectually accepting that concept [preemption] . . . Because it is flat-out so wrong in my opinion . . . with all due respect to the Supreme Court." T. 16621-23, 32623. Those comments strongly suggest that the sole Florida court to address Petitioners' preemption arguments did not give them a fair and proper hearing.

II. REVIEW IS WARRANTED BECAUSE THE FLORIDA PROCEEDINGS EXEMPLIFY THE COMMON TENDENCY OF BOTH STATE AND FEDERAL COURTS TO ADOPT INAPPROPRIATE SHORTCUTS WHEN FACED WITH LARGE NUMBERS OF CLAIMS

Review is also warranted because the Florida proceedings are not unique. Rather, they exemplify the tendency of many state and federal courts to adopt inappropriate shortcuts when faced with large numbers of claims. For example, a recent news story highlighted a trend among plaintiffs' lawyers: repackaging product liability claims as claims arising under consumer-protection laws and thereby significantly increasing the chances that they can obtain certification of massive

plaintiff classes. A. Bronstad, "A New Use for Consumer Class Actions," *National Law Journal* (July 9, 2007) at 1.

State courts regularly are asked to certify nationwide class actions in cases raising common law claims. Such nationwide class actions often face an intractable problem: it is difficult to assert that common issues of law predominate over legal issues applicable to individual class members if each plaintiff is deemed governed by the laws of his state of residency. A number of state courts have "solved" this dilemma by applying a dubious shortcut: they apply the laws of a single State to the claims of all class members. *See, e.g., Ysbrand v. DaimlerChrysler Corp.*, 2003 Ok. 17 (2003), *cert. denied*, 542 U.S. 937 (2004); *Peterson v. BASF Corp.*, 675 N.W.2d 51 (Minn. 2004), *vacated and remanded on other grounds*, 544 U.S. 1012 (2005), *aff'd*, 711 N.W.2d 470 (Minn.), *cert. denied*, 127 S. Ct. 579 (2006).[5] Here, the Florida courts took another, equally problematic, shortcut: they simply asserted that the issues tried on a class-wide basis were "common" - even though the wildly diverse set of evidence introduced in Phase I had no relationship with the experiences of any particular class member and even though much of that evidence would simply have been irrelevant to and inadmissible in the trial of any individual plaintiff.

Nor is inappropriate certification of plaintiff classes confined to state courts. In *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214 (9th Cir. 2007), the Ninth Circuit upheld certification of a class of 1.5 million employees raising claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* A

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[5] *See also Hall v. Sprint Spectrum L.P.*, ___ N.E. 2d ___, 2007 WL 1892679 (Ill. App. June 27, 2007) (upholding certification of 48-state class action against wireless communications provider); *Dale v. DaimlerChrysler Corp.*, 204 S.W.3d 151 (Mo. App. 2000); *In re West Virginia Rezulin Litigation*, 214 W.Va. 52 (2003).

dissenting judge argued that by adopting procedural shortcuts to facilitate class-wide adjudication, the district court adopted a trial plan that ran roughshod over the defendant's due process rights. *Id.* at 1245-49 (Kleinfeld, J., dissenting).

This Court has recognized in recent decisions the importance of protecting defendants from the costs of unwarranted and abusive lawsuits. For example, in *Bell Atlantic Corp v. Twombly*, 127 S. Ct. 1955, 1967 (2007), the Court held that Fed.R.Civ.P. 8 (which establishes minimum requirements for complaints) must be read sufficiently stringently to weed out implausible claims at the pleadings stage, because "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching [summary judgment] proceedings." Similarly, in *Tellabs, Inc. v. Makor Issues & Rights, Inc.*, 127 S. Ct. 2499, 2508 (2007), the Court raised the pleading requirements for plaintiffs seeking to file securities fraud litigation, in recognition of Congress's desire to weed out "nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests, and manipulation by class action lawyers." *See also Leegin Creative Leather Prods. v. PSKS, Inc.*, 127 S. Ct. 2705, 2718 (2007) (eliminating *per se* condemnation of vertical price constraints, in an effort to eliminate unnecessary costs on the business community imposed by antitrust litigation). WLF respectfully suggests that the Court's expressed interest in controlling unnecessary litigation costs warrants granting review in this case, for the purpose of ensuring that class action devices are not employed in a manner that ignores the due process rights of litigants.

CONCLUSION

Amicus curiae Washington Legal Foundation respectfully requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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